TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 24

BRITISH-AMERICAN TOBACCO COMPANY, LTD.,
PETITIONER,

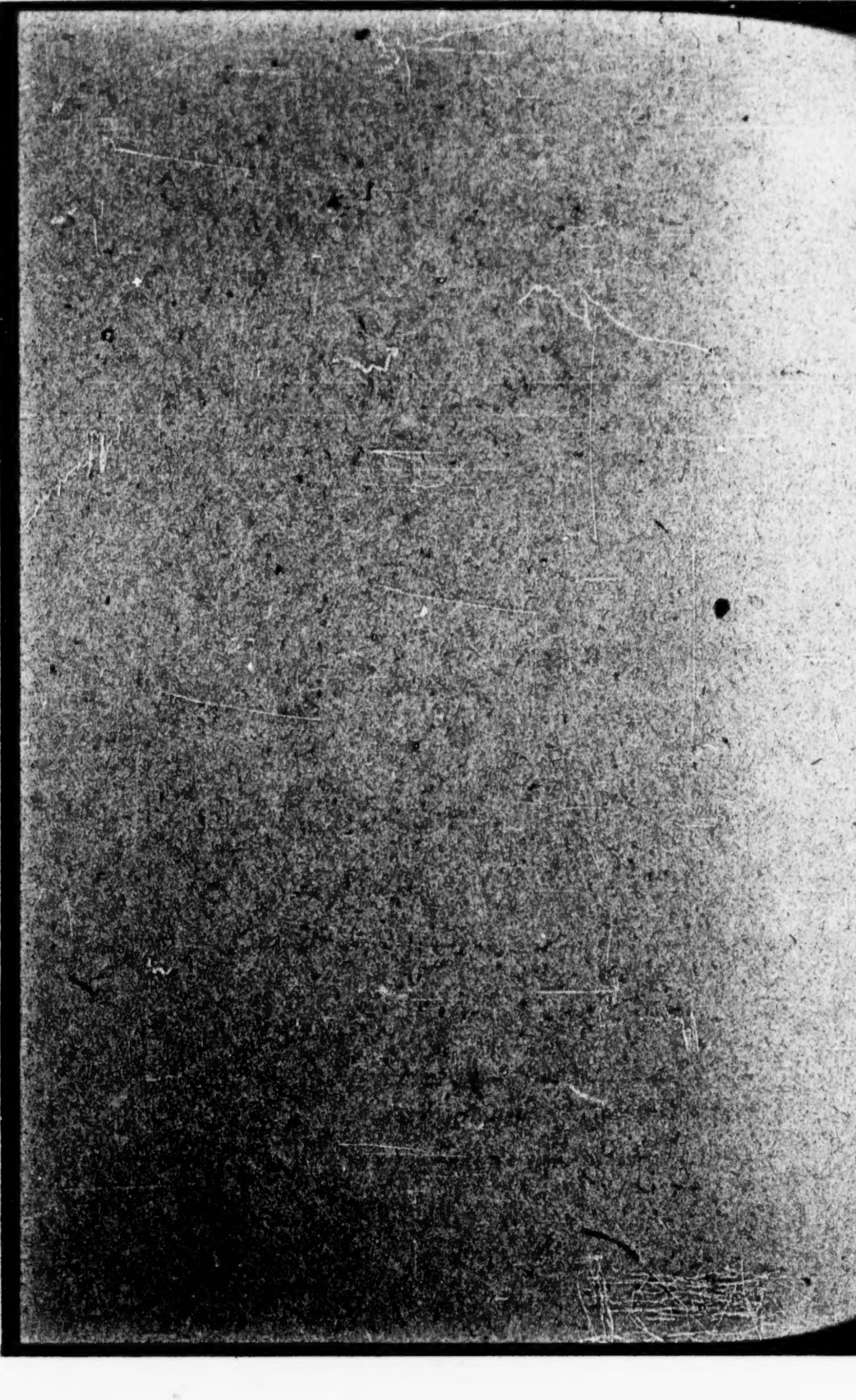
vs.

GUY T. HELVERING, COMMISSIONER OF
INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 23, 1934

CERTIORARI GRANTED MAY 7, 1934



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BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 41224

BRITISH-AMERICAN TOBACCO COMPANY, LTD., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

Appearances:

For Taxpayer: H. H. Shelton, Esq.
For Commissioner: C. C. Holmes, Esq., James C. Maddox, Esq.
Transferred to Mr. Sternhagen 10/7/32.

1928

Oct 26. Petition received and filed. Taxpayer notified. (Fee paid.)
" 27. Copy of petition served on General Counsel.
" 29. Amended petition filed by taxpayer.
" 30. Copy of amended petition served on General Counsel.
Dec. 22. Answer to petition and amended petition filed by General Counsel.

1929

Jan. 4. Copy served on taxpayer. General Calendar.
[fol. 2]

1931

Oct. 6. Hearing set Nov. 19, 1931.
Nov. 19. Stipulation of facts filed. (1)
" 19. Hearing had before Mr. Smith, Div. 5. Called on merits—motion to submit on stipulation filed. Briefs due in 30 days.
" 23. Transcript of hearing of Nov. 19, 1931, filed.
Dec. 11. Brief filed by General Counsel.
" 19. Brief filed by taxpayer.

1932

Mar. 9. Memorandum opinion rendered, Mr. Smith, Div. 5. Judgment will be entered for the Commissioner.

" 9. Decision entered, Mr. Smith, Div. 5.

Aug. 1. Motion to reopen and reconsider case filed by taxpayer.

" 5. Hearing set August 10, 1932 on motion.

" 5. Copy of motion and hearing notice served on General Counsel.

" 10. Hearing had before Mr. Smith, Div. 5 on petitioner's motion to vacate decision—held C. A. V.—no briefs.

" 17. Transcript of hearing Aug. 10, 1932, filed.

" 22. Order to vacate decision of Mar. 9, 1932, entered.

[fol. 3]

Dec. 6. Opinion rendered, Mr. Sternhagen, Div. 10. Judgment will be entered under Rule 50.

1933

Jan. 30. Notice of settlement filed by General Counsel.

Feb. 4. Hearing set 3/1/33 on settlement.

" 22. Objections to computation of General Counsel filed by taxpayer. 2/27/33 copy served.

Mar. 1. Hearing had before Mr. Sternhagen, Div. 10 on settlement under Rule 50. Order in accordance with respondent's computation.

" 6. Decision entered, Div. 10.

May 29. Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by General Counsel.

June 1. Proof of service filed by General Counsel. (Attorney.)

" 8. Proof of service filed by General Counsel. (Taxpayer.)

July 18. Præcipe filed—proof of service thereon.

" 28. Order enlarging time to September 15, 1933, to file certified copies of record papers, entered.

[fol. 4] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

AMENDED PETITION

The above named petitioner hereby petitions for a redetermination of deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated August 27, 1928, and as a basis for its proceedings alleges as follows:

Jurisdiction of the Board

First: The petitioner is a corporation duly organized and existing under the laws of the Imperial Parliament of Great Britain, with its registered office and place of business at Westminster House, 7 Millbank, London, S. W. 1, England, and with an office and its principal place of business in the United States at Number 535 Fifth Avenue, New York City, New York.

Second: Notice of deficiency, copy of which is hereto attached and marked "Exhibit A," was mailed to the petitioner on August 27, 1928, and states a deficiency of $195,432.20.

[fol. 5] Third: The taxes in controversy are income taxes for the calendar years 1925 and 1926, such taxes in controversy being in the amount of $12,600.20 for the calendar and taxable year 1925, and $182,832.00 for the calendar and taxable year 1926.

Assignments of Error

Fourth: The determination of taxes set forth in the said notice of deficiency is based on the following errors:

(1) The Commissioner has included in net taxable income for the calendar and taxable year 1925 the sum of $132,407.17, being an amount paid by the United States to and received by the petitioner in the year 1925 as interest on an obligation of the United States to refund income and excess profits taxes theretofore illegally collected by the United States, whereas such payment of interest as interest on an obligation of the United States is not subject to income tax by virtue of Section 213 (b) (4) of the Revenue Act of 1924.

(2) The Commission has included in net taxable income for the calendar and taxable year 1926 the sum of $1,394,-357.64, being an amount paid by the United States to and received by the petitioner in the year 1926 as interest on an obligation of the United States to refund income and excess profits taxes theretofore illegally collected by the United States, whereas such payment of interest as interest on an obligation of the United States is not subject to income tax by virtue of Section 213 (b) (4) of the Revenue Act of 1926.

[fol. 6] Statement of Facts

Fifth: The facts upon which the petitioner relies as a basis for this proceeding are as follows:

(1) The petitioner received in the year 1925 the sum of $132,407.17 paid to it by the United States.

(2) The sum of $132,407.17 so received by it was in payment of interest on an obligation of the United States to refund income and profits taxes theretofore illegally collected from the petitioner and the refund of which was made in 1925.

(3) The said sum of $132,407.17 so received by it has been included by the Commissioner of Internal Revenue in the gross income of the petitioner in computing the petitioner's income tax and the alleged deficiency for the year of $12,600.20 for the year 1925.

(4) The petitioner received in the year 1926 the sum of $1,394,357.64 paid to it by the United States.

(5) The sum of $1,394,357.64 so received by it was in payment of interest on an obligation of the United States to refund income and profits taxes theretofore illegally collected from the petitioner and the refund of which was made in 1926.

(6) The said sum of $1,394,357.64 so received by it has been included by the Commissioner of Internal Revenue in the gross income of the petitioner in computing the petitioners' income tax and the alleged deficiency for the year of $182,832.00 for the year 1926.

[fol. 7] Wherefore this petitioner respectfully prays that this Board may hear this proceeding and that judgment be entered therein that there is no deficiency.

H. H. Shelton, Counsel for the Petitioner, Munsey Building, Washington, D. C. H. M. Robertson, of Counsel, 535 Fifth Avenue, New York, N. Y.

Duly sworn to by Robert C. Harrison. Jurat omitted in printing.

[fol. 8] EXHIBIT "A" TO AMENDED PETITION

Treasury Department, Washington

August 27, 1928.

British American Tobacco Company, Limited, 535 Fifth Avenue, New York, New York.

SIRS: In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the years 1924, 1925 and 1926 discloses a deficiency of $195,432.20 for the years 1925 and 1926 and an overassessment of $9,409.24 for the years 1924 as shown in the attached statement.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter for a redetermination of your tax liability. However, if you acquiesce in this determination, you are requested to execute the enclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully, D. H. Blair, Commissioner, by (Signed) C. B. Allen, Deputy Commissioner.

Enclosures: Statement, Form 866, Form 882.

[fol. 9] (Copy)

Statement

IT:AR:A—6. FRS—60D

In re British American Tobacco Company, Limited, 535 Fifth Avenue, New York, New York

	Deficiency in Tax	Overassessment
1924	.....	$9,409.24
1925	$12,600.20	.....
1926	182,832.00	.....
Totals	$195,432.20	$9,409.24

Reference is made to the report of the Internal Revenue Agent in Charge, New York, New York, and to your protest submitted under date of May 2, 1928. Careful consideration has been accorded your protest in connection with the agent's findings and the report on the conference with your representative on June 1, 1928, in the office of the Agent in Charge.

Your contention that the agent failed to allow as a deduction the tax paid to the British Government has been conceded. Accordingly a deduction of $76,273.88, British income and profits taxes, has been allowed for 1924, and $34,192.19 allowed for 1925.

Your contention that the interest on refunds of taxes paid the United States Government represents interest on obligations of the United States and should not be included in gross income by virtue of Section 213 (b) (4) of the Revenue Acts of 1924 and 1926 is denied, since Income Tax [fol. 10] Decision 1748, published in Cumulative Bulletin II-2, July to December, 1923, Page 92, states:

"Interest received from the United States on a refund of Federal estate taxes is not interest upon an obligation of the United States within the meaning of Section 213 (b) (4)."

1924

Income Adjustments

Net income as shown on return	$924,081.43
Add:	
1. Profit on sale of machinery understated	1,000.00
	$925,081.43
Deduct:	
2. British income and profits taxes allowable	76,273.88
Adjusted net income	$848,807.55

Explanation of Adjustments

1. Asset	Cost	Depreciation	Received	Net Profit or Loss
Machinery and Fixtures	$40,145.93	$30,652.68	$13,555.39	$4,062.14
Furniture and Fixtures	5,604.34	2,688.38	785.00	($2,130.96)
Autos	850.00	850.00	100.00	100.00

Total net profit (Article 1591, Regulation 65)	$2,031.18
Net profit as shown on return	1,031.18
Additional income	$1,000.00

[fol. 11] 2. Total British taxes paid £237,-205-15-0] at $1.43		$1,050,821.47
Gross income United States as adjusted		$2,139,631.79
Gross income United States and Great Britain		$29,477,040.59
Percentage of United States gross income to to total United States and Great Britain income		7.2585%
7.2585% of total British taxes paid ($1,050,-821.47)		$76,273.88
(Allowable under Section 234 (a) (3), Revenue Act of 1924.)		

Computation of Tax

Net income as adjusted	$848,807.55
Income tax at 12½%	$106,100.94
Tax previously assessed	115,510.18
Overassessment	$9,409.24

1925

Income Adjustment

Net income as shown on return		$609,874.10
Add:		
1. Interest on refund of United States income and profits taxes		132,407.17
		$823,281.27
Deduct:		
2. Gross sales overstated	$1,290.37	
3. British income and profits taxes allowable	34,192.19	
		35,482.56
Adjusted net income		$787,798.71

[fol. 12] Explanation of Adjustments

1. Interest received on refund of United States income and profits taxes considered income. (Income Tax Decision 1748, published in Cumulative Bulletin II-2, July to December, 1923, Page 92.)

2. Gross sales shown on return	$7,819,661.07
Correct gross sales shown by books	7,818,370.70
Overstated (Article 23, Regulations 69)	$1,290.37
3. Total British taxes paid £119,047–0–0 at $4.8326	$575,306.53
Gross income United States as adjusted	$2,019,497.90
Gross income United States and Great Britain	$33,979,219.96
Percentage of United States gross income to total United States and Great Britain	5.9433%
5.9433% of British taxes, $575,306.53 (Section 23 (a) (S), Revenue Act of 1926)	$34,192.19

Computation of Tax

Net income as adjusted	$787,798.71
Income tax at 13%	$102,413.83
Tax previously assessed	89,813.63
Deficiency in tax	$12,600.20

[fol. 13] 1926

Income Adjustment

Net income as shown on return	$780,046.37
Add:	
1. Interest on refund of United States income and profits taxes	1,394,357.64
	$2,174,404.01
Deduct:	
2. British income taxes allowable	40,046.55
Adjusted net income	$2,134,357.46

Explanation of Adjustments

1. See explanation under Item 1 for 1925.

2. Total British income tax paid as shown on return $1,122,227.46
Gross income United States as adjusted $4,214,621.93
Gross income United States and Great Britain $39,073,671.00
Percentage of United States gross income to total United States and Great Britain income 10.7863%
10.7863% of British taxes, $1,122,227.46 $121,046.82
British taxes deducted on return 81,000.27

Additional allowable (Section 234 (a) (3), Revenue Act of 1926) $40,046.55

[fol. 14] Computation of Tax

Net income as adjusted	$2,134,357.46
Income tax at 13½%	$288,138.26
Tax previously assessed	105,306.26
Deficiency in tax	$182,832.00

The overassessment shown herein will be made the subject of a Certificate of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 284 of the Revenue Act of 1926.

The right of petition as indicated on page one of this letter refers only to any deficiency in tax indicated herein inasmuch as there is no provision in the Revenue Act of 1926 granting the right of petition against the determination of any overassessment found upon a review of your return.

Your claim for refunding of $16,968.30 income taxes for the year 1924 will be allowed for $9,409.24.

Your claim for refunding of $4,321.35 income taxes for the year 1925 will be rejected, since the adjustment of income as shown above discloses a deficiency in tax. The rejection will officially appear in a schedule to be approved by the Commissioner.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

[fol. 15] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER TO PETITION AND AMENDED PETITION

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition and amended petition of the above named taxpayer, admits and denies as follows:

First, Second, Third: Admits the allegations in paragraphs numbered First, Second and Third.

Fifth: (1) Admits the allegations in paragraph Fifth, (1).

(2) Denies the allegations in paragraph Fifth, (2).

(3) (4) Admits the allegations in paragraphs Fifth, (3) and (4).

(5) Denies the allegations in paragraph Fifth, (5.)

(6) Admits the allegations in paragraph Fifth, (6).

Denies generally and specifically each and every allegation in taxpayer's petition and amended petition, not here-
[fol. 16] inbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the petition be denied.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: John D. Foley, Special Attorney, Bureau of Internal Revenue.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that petitioner is, and at all times hereinafter mentioned was, a corporation duly organized and existing under the laws of the
[fol. 17] Imperial Parliament of Great Britain, with its registered office and place of business at Westminster House, 7, Millbank, London, S. W. 1, England. At the time this appeal was filed with the Board it had its office and principal place of business in the United States at No. 535 Fifth Avenue, New York, New York. Its office and principal place of business in the United States is now at No. 1600 West Hill Street, Louisville, Kentucky. Its income tax returns for the calendar years 1925 and 1926 were duly filed with the Collector of Internal Revenue for the Third Collection District of New York in the City of New York, State of New York.

During the calendar year 1925 the petitioner received a refund of an overpayment of federal income and excess profits taxes for the calendar year 1917 theretofore illegally collected from the taxpayer. Petitioner received at the same time interest from the United States upon said refund, the amount of said interest being $132,407.17. In its income tax return for the calendar year 1925 petitioner did not include in its taxable income said interest in the amount of $132,407.17, although in said return said interest was stated to have been received with the accompanying assertion that it was not subject to taxation, and such claim has ever since been maintained. In his defi-

ciency letter respondent has increased petitioner's net taxable income by said amount of $132,407.17, the interest upon the refund above referred to.

During the calendar year 1926, petitioner received refunds of overpayments of income and excess profits taxes [fol. 18] for the calendar years 1918 and 1919 theretofore illegally collected from petitioner. At the same time petitoner received interest upon said overpayments in the amount of $1,394,357.64. In its income tax return for the calendar year 1926 petitioner did not include in its income said interest in the amount of $1,394,357.64, although in the said return said interest was stated to have been received with the accompanying assertion that it was not subject to taxation, and such claim has ever since been maintained. In his deficiency letter respondent has increased petitioner's taxable net income by said amount of $1,394,357.64 on account of interest receievd on said refunds.

(Signed) H. H. Shelton, Attorney for Petitioner.
C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[fol. 19] Before United States Board of Tax Appeals

Docket No. 41224

British-American Tobacco Company, Ltd., Petitioner,

v.

Commissioner of Internal Revenue, Respondent

In 1925 and 1926, the petitioner received from the United States large refunds of taxes paid in 1917, 1918, and 1919, and large amounts of interest thereon. The petitioner contends that the interest received on such refunds is exempt from income tax. Held, that such interest did not represent "interest on the obligations of the United States," within the meaning of Section 213 (b) (4) of the Revenue Acts of 1924 and 1926 and that it was consequently not exempt from income tax.

H. H. Shelton, Esq., for the Petitioner.

C. C. Holmes, Esq., for the Respondent.

MEMORANDUM OPINION

SMITH:

This is a proceeding for the redetermination of deficiencies in income tax for 1925 and 1926 of $12,600.20 and $182,832, respectively. The issue presented is whether interest received by the petitioner in the years 1925 and 1926 upon refunds of taxes illegally or erroneously collected by the United States in prior years is exempt from income tax.

[fol. 20] In 1925, the petitioner received a refund of overpayment of Federal income and profits taxes for the calendar year 1917, and, at the same time, received interest from the United States upon said refund in the amount of $132,407.17. In 1926, petitioner received refunds of overpayments of income and profits tax for the calendar years 1918 and 1919 theretofore illegally collected from the petitioner and, at the same time, received interest upon said overpayments in the amount of $1,394,357.64. The petitioner reported these amounts on its income tax returns for 1925 and 1926 as non-taxable income. The respondent has included the amounts in taxable income in the computation of the deficiencies herein involved.

Section 213 of the Revenue Acts of 1924 and 1926 provides in part as follows:

"For the purposes of this title, except as otherwise provided in Section 233—

* * * * * * *

(b) The term 'gross income' does not include the following items, which shall be exempt from taxation under this title:

* * * * * * *

(4) Interest upon * * * (C) the obligations of the United States or its possessions. * * * In the case of the obligations of the United States issued after September 1, 1917 (other than postal savings certificates of deposit), the interest shall be exempt only if and to the extent provided in the respective Acts authorizing the issue thereof [fol. 21] as amended and supplemented, and shall be excluded from gross income only if and to the extent it is wholly exempt to the taxpayer from income taxes."

The precise question involved in this proceeding was before the Board in American Viscose Corporation, 19 B. T. A. 937, in which we held that the interest received by the petitioner did not represent "interest upon obligations of the United States" within the meaning of Section 213 (b) (4) of the Revenue Act of 1926, and consequently was not subject to the exemption provided by that section. The decision in that case was affirmed by the Circuit Court of Appeals for the Third Circuit on February 16, 1932, — Fed. (2d), —. Our decision in the above cited case was based upon our decision in Kansas City Southern Railway Company, 16 B. T. A. 665, in which we entered into an elaborate discussion (pp. 687-694) of what is meant by the term "obligations of the United States." See also Missouri Pacific R. R. Company, 22 B. T. A. 267, 295. The above cited decisions are controlling upon the point in issue.

Judgment will be entered for the respondent.

Enter: Entered, Mar. 9, 1932.

[fol. 22] BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 41224

BRITISH-AMERICAN TOBACCO COMPANY, LTD., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the determination of the Board, as set forth in its promulgated memorandum opinion, entered March 9, 1932, it is

Ordered and decided: That there are deficiencies for the years 1925 and 1926 of $12,600.20 and $182,832.00, respectively.

Enter: Entered, Mar. 9, 1932.

A true copy. Teste:

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.

(Seal.) (Signed) Charles P. Smith, Member.

[fol. 23] BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

[Title omitted]

ORDER VACATING DECISION

For good cause shown, it is

Ordered that the decision entered in the above entitled proceeding March 9, 1932, to the effect that there are deficiencies for the years 1925 and 1926 of $12,600.20 and $182,832, respectively, be and the same is hereby vacated and set aside.

(Signed) Charles P. Smith, Member. (Seal.)

Enter: August 22, 1932.

CPS:aa.

[fol. 24] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 41224

BRITISH-AMERICAN TOBACCO COMPANY, LTD., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Promulgated December 6, 1932.

H. H. Shelton, Esq., and H. M. Robertson, Esq., for the Petitioner.

C. C. Holmes, Esq., and John D. Foley, Esq., for the Respondent.

OPINION

STERNHAGEN:

The respondent determined deficiencies of $12,600.20 for 1925 and $182,832.00 for 1926 in the income tax of the petitioner, a foreign corporation. The facts are stipulated and are in essence that in the years in question the petitioner received from the United States stipulated amounts of interest upon refunds of overpayments of income and profits taxes paid for 1917, 1918, and 1919, which respondent has determined were within petitioner's taxable income.

This determination the petitioner challenges and cites Stockholms Enskilda Bank, 25 B. T. A. 1328. That decision decides precisely the same issue; and in accordance therewith, the respondent's determination is reversed.

Reviewed by the Board.

Judgment will be entered under Rule 50.

Trammel concurs in the result.

[fol. 25] CONCURRING OPINION

LOVE, concurring:

I concur in the prevailing opinion in this case, but as it is based entirely on the opinion and decision in the Stockholms Enskilda Bank case, and as I believe that case, while correct in result, was based on unsound grounds, I here desire to set forth my views.

I agree with the dissenting opinion of Smith, Member, on the proposition that the Government of the United States is a resident within the territorial limits of the United States.

As pointed out by the Supreme Court in Van Brocklin v. State of Tennessee, 117 U. S. 151, the Government of the United States is a "great corporation," ordained and established by the American people in their sovereign capacity as an agency of government, to exercise, and empowered to exercise, on behalf of the sovereign, certain governmental functions, and that "corporation's" domicile, or residence, is within, and co-extensive with, the territorial limits of the United States. See United States v. Borchelling, 185 U. S. 223.

I do not agree with the result of the Smith dissenting opinion or with the ground upon which the Stockholms Enskilda Bank case was decided for the reason that, even assuming for the sake of argument that the words "obligations of residents, corporate or the otherwise" used in Section 217 (a) (1), supra, could be construed as meaning "obligations of the United States," it has been held, in American Viscose Corp. v. Commissioner, 56 Fed. (2d) 1033, that a refund by the United States of illegal taxes was not an "obligation of the United States" and that, therefore, the interest received by the Viscose Corporation on such refund was not exempt from taxation under Section 213 (b) [fol. 26] (4) of the Revenue Act of 1926, which provided

that "the term 'gross income' does not include the following items, which shall be exempt from taxation * * * interest upon * * * (C) the obligations of the United States * * *." That issue was the controlling issue in the case, and the Supreme Court denied certiorari on October 10, 1932.

In the instant case, Section 233 (b) provides that "In the case of a foreign corporation, gross income means only gross income from sources within the United States, determined * * * in the manner provided in Section 217." Section 217 (a) provides that "the following items of gross income shall be treated as income from sources within the United States: (1) Interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise" and subdivision (c) provides that "The following items of gross income shall be treated as income from sources without the United States, (1) Interest other than that derived from sources within the United States as provided in paragraph (1) of subdivision (a) * * *." In other words, unless the interest in the instant case be brought within the provisions of Section 217 (a) (1), supra, it is not subject to tax under the specific provisions of the statute. The interest in question was not interest on a bond or a note, and, as decided in the Viscose Corporation case, it was not interest upon an "obligation of the United States." The term "obligation" cannot mean one thing under Section 213 and an entirely different thing under Section 217 of the same act.

Black agrees with this concurring opinion.

[fol. 27] DISSENTING OPINION

SMITH, dissenting:

Section 233 of the Revenue Act of 1926, provides, in part, as follows:

"(b) In the case of a foreign corporation, gross income means only gross income from sources within the United States, determined (except in the case of insurance companies subject to the tax imposed by Section 243 or 246) in the manner provided in Section 217."

Section 217 provides, in part, as follows:

"(a) In the case of a non-resident alien individual * * * the following items of gross income shall be treated as income from sources within the United States:

(1) Interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, not including (A) interest on deposits with persons carrying on the banking business paid to persons not engaged in business within the United States and not having an office or place of business therein, * * *

* * * * * * *

(c) The following items of gross income shall be treated as income from sources without the United States:

(1) Interest other than that derived from sources within the United States as provided in paragraph (1) of subdivision (a)."

The prevailing opinion of the Board holds, in accordance with Stockholms Enskilda Bank, 25 B. T. A. 1328, that the [fol. 28] interest paid on refunds of Federal income taxes is not income from sources within the United States within the purview of Section 217 (a) (1), above quoted. In the Enskilda Bank case we denied the petitioner's contention that the interest thus received was not on interest-bearing obligations" within the purview of Section 217 (a) (1) but gave judgment for the petitioner upon the ground that the United States was not a "resident" of the United States within the contemplation of the applicable provision of the statute. With this conclusion I can not agree.

The manifest intention of the statute was to include in the income of foreign taxpayers interest upon all obligations where the interest was paid by corporations or other payors which might be classeed as "resident." The statute then provides in subdivision (c) of Section 217 that all other interest received by non-residents shall be regarded as from sources without the United States. It seems to me utterly incompatible with a reasonable construction of the statute that interest paid by the United States Government is to be regarded as from a source without the United States, and that is necessarily the conclusion of the Board

in the Enskilda Bank case. I can see no reason for construing the statute as exempting from income tax the interest paid on refunds of Federal income taxes received by foreign corporations transacting business and having an office in the United States, as was the petitioner, and subjecting to tax a domestic corporation in similar circumstances, as was done in American Viscose Corporation, et [fol. 29] al., 19 B. T. A. 937, affirmed by the Circuit Court of Appeals for the Third Circuit in American Viscose Corporation v. Commissioner, 56 Fed. (2d) 1933.

If the United States is not a "resident" of the United States within the contemplation of the statute, of what country is it a "resident"? In Van Brocklin v. State of Tennessee, 117 U. S. 151, the Supreme Court, quoting Chief Justice Marshall, said:

"* * * The United States is a government, and consequently a body politic and corporate, capable of attaining the objects for which is was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American people and endowed by them with great powers for important purposes. * * *"

In United States v. Borcherling, 185 U. S. 223, 233, it was stated:

"In Vaughn v. Northrup, 15 Pet. 1, Mr. Justice Story, delivering the opinion of the court, said: 'The debts due from the government of the United States have no locality at the seat of government. The United States in their sovereign capacity have no particular place of domicile, but possess, in contemplation of law, an ubiquity throughout the United States; and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in his own domicile,' and accordingly it [fol. 30] was held in that case, that 'the administrator of a creditor of the government duly appointed in the State where the creditor was domiciled at the time of his death, has full authority to receive payment and give a full discharge of the debt due his intestate in any place where the government may choose to pay it, whether it be at the seat of government or at any other place where the public funds

are deposited; and that moneys so received constituted assets * * *.'"

See also Mackey, et al. v. Coxe, 18 How. 100, 105; Wyman v. Halstead, 109 U. S. 654. I am of opinion that interest received by a foreign corporation upon refunds of Federal income taxes paid by the United States Government constitutes income from a source within the United States within the meaning of the statute.

Seawell agrees with the above dissent.

DISSENTING OPINION

MATTHEWS, dissenting:

I am unable to concur in the majority opinion in this case, because I think the decision in Stockholms Enskilda Bank, 25 B. T. A. 1328, upon which it rests, is wrong.

The decision in the Stockholms Bank case rests on the view that although Section 217 (a) (1) is not limited to interest on obligations similar to bonds and notes, interest paid by the United States on a refund of tax does not come within such provision because the United States is not a resident of the United States, and, therefore, that such interest comes within subsection (c) 1, and is to be treated [fol. 31] as income from a source without the United States. To hold that interest paid by the United States Government is to be treated as from a source without the United States is to construe the statute as exempting such interest from tax when paid to a non-resident alien or foreign corporation.

It is a well-settled rule that exemptions from taxation must be express and must be strictly construed. The rule as to the proper construction of doubtful statutes, which was invoked in the Stockholms Bank case, is not the rule to be applied in determining exemptions from taxation.

In Bank of Commerce v. Tennessee, 161 U. S. 134, the Supreme Court said:

"These cases show the principle upon which is founded the rule that a claim for exemption from taxation must be clearly made out. Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of

his share of taxes on any portion of his property must on that account be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well founded doubt is fatal to the claim; no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power.

[fol. 32] The rule was reaffirmed in Theological Seminary v. Illinois, 188 U. S. 662, 672, in these words:

"The rule is that, in claims for exemption from taxation, under legislative authority, the exemption must be plainly and unmistakably granted; it cannot exist by implication only; a doubt is fatal to the claim."

The rule was discussed fully in this Board's decision in Kansas City Southern Ry. Co., 16 B. T. A. 665.

The question involved cannot be decided by looking only at subsections (a) 1, and (c) 1, of Section 217, as was done in the Stockholms Bank case, nor even by looking merely at all of Section 217. The statute as a whole must be taken into consideration.

Reading the statute as a whole, it plainly intends to tax non-resident aliens and foreign corporations on net income from sources within the United States. Section 217 contains the rules for determining the source of items of gross income, and the manner in which net income from sources in the United States is to be computed. It also exempts one item of gross income from a source within the United States, namely, interest on deposits in banks in the United States, when such income is paid to a non-resident alien individual or a non-resident foreign corporation. But "gross income" is defined in Section 213. Subsection (a) of Section 213 enumerates various items which the term "gross income" includes. Interest is an item specifically included. Subsection (b) enumerates certain items of in- [fol. 33] come which are not included in the term "gross income" and which are specifically exempted from tax.

Among the items of gross income enumerated in subsection (b) as exempt from tax is interest on "obligations

of the United States," but in the case of obligations of the United States issued after September 1, 1917, such exemption applies only if and to the extent provided by the act authorizing the issue thereof. Subsection (b) (4) (C). It has been held that the expression "obligations of the United States," as used in Section 213 (b) (4) (C), in connection with the word "issued," has acquired a restricted meaning and that the exemption of such obligations and the interest thereon is based on the policy of safeguarding the public credit, and is strictly limited to this object. Kansas City Southern Ry. Co. v. Commissioner, supra; affirmed on this point, 52 Fed. (2d) 372; certiorari denied, 284 U. S. 676. It has also been held that interest on a refund of income tax is not interest on an "obligation of the United States," within the meaning of this provision of Section 213 (b), but is taxable under Section 213 (a). American Viscose Corp., 19 B. T. A. 937; affd. 56 Fed. (2d) 1033; certiorari denied by the Supreme Court on October 10, 1932.

Demonstrably, then, such interest as is here involved is not exempted under Section 213 (b). It is taxable income in nature. The only question left is whether it is gross income from a source within the United States. Viewed from the standpoint of fact and logic, to say that the Government of the United States, which is the "source" of the interest [fol. 34] here involved, is not within the United States, would be to utter a palpable absurdity. The imperium or sovereignty of the United States is co-extensive with its territorial domain, and the United States as a body politic and corporate exists or resides within that domain. An obligation issuing from it, which is created by its will and consent, must, therefore, derive from a "source within the United States." Consequently, I have no difficulty in reaching the conclusion that the interest here in question is within the meaning of Section 217 (a) (1). Certainly, any intention to exempt such an item of income on the part of Congress would have to be plainly and unmistakably expressed. There is no such expression. If it had been the intention to exempt all interest paid by the United States to non-resident aliens and foreign corporations, Congress could have written in such exemption just as it has written in the exemption of interest on bank deposits paid to non-resident aliens and non-resident foreign corporations.

If a technical argument were necessary to achieve the desired end, it might be pointed out that under Section 3220

of the Revised Statutes, as amended by the Revenue Act of 1926, "The Commissioner of Internal Revenue * * * is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected," and under Section 1116 interest, at the rate of 6 per cent per annum from the date such tax was paid to the date of the allowance of the refund, is to be allowed and paid on such refund. The Commissioner is an officer of the United States. Congress has imposed on him the duty and lodged in him the power [fol. 35] to assess and collect all income taxes. It is his duty to refund all unlawful or erroneous exactions of taxes. The refund is his obligation. He is the "source." He is a resident of the City of Washington, the seat of the Federal Government, and certainly within the ambit of Section 217 (a) 1.

That the Commissioner is to be treated as the "source" of interest paid by the United States on a refund, also appears from section 221, the provisions of which except as to rate of withholding, are made applicable to nonresident foreign corporations by section 237. Section 221, entitled "Payment of Individual's Tax at Source," provides:

> All persons, in whatever capacity acting, including * * * all officers and employees of the United States, having the control, receipt, custody, disposal, or *payment of interest* (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), * * * of any nonresident alien individual, * * * shall (except in the cases provided for in subdivision (b) and except as otherwise provided in regulations prescribed by the Commissioner under section 217) deduct and withhold from such * * * income a tax equal to 5 per centum thereof. (Italics mine.)

The Commissioner has not issued any regulations under section 217 relieving officers and employees of the United [fol. 36] States from the duty of withholding the tax from the items of income specified in section 221. It would seem, therefore, that tax should have been withheld at the source from the interest paid on the refunds made to the Stockholms Enskilda Bank, a nonresident foreign corporation.

The possibilities of a tax-free yield of 6 per cent to foreign corporations and nonresident aliens, which the decision in

the Stockholms Bank case opens up, will not be overlooked, particularly by resident foreign corporations. Under our system of self-assessment, there is nothing to prevent such corporations from including in the return of income and paying income tax on items of foreign income or, even for that matter, tax-exempt income from United States sources, such as interest on Liberty Bonds and municipal bonds, knowing full well that a claim for refund filed within the statutory period, two years, based on the erroneous inclusion in gross income of items of income from sources without the United States and items of tax-exempt income, will be allowed and that the amount of such refund will draw interest at the rate of 6 per cent from the date the tax was paid to the date of the allowance. The statute does not now require that the tax be paid under protest in order to obtain a refund.

In the instant case the parties stipulated that the petitioner, a resident foreign corporation, received in 1925 a refund of Federal income and profits taxes for 1917, and at the same time interest on such refund in the amount of $132,407.17; and that in 1926 the petitioner received a re- [fol. 37] fund of income and profits taxes for 1918 and 1919 and interest upon such refund in the amount of $1,394,357.64.

If the above amounts had been paid to a citizen, resident, or domestic corporation, they would have been taxed. There is no reason of public policy why they should not be taxed when paid to a nonresident alien or a foreign corporation. They are from a source in the United States—the Government itself. The statute does not expressly exempt such interest from tax. I think, therefore, the decision in the Stockholms Enskilda Bank case should be overruled, and judgment found for the respondent in this case.

BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 41224

BRITISH-AMERICAN TOBACCO COMPANY, LTD., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

JUDGMENT

Subsequent to the Board's report of December 6, 1932, 27 B. T. A. 226, the parties filed their respective computa-

[fol. 38] tions of overpayment. The petitioner includes within the alleged overpayment interest paid upon the previously overpaid tax. Otherwise there is no dispute. The inclusion of such interest being contrary to Capital Building & Loan Association, 23 B. T. A. 848, it is hereby rejected. The parties being otherwise in agreement that the Commissioner's computation is in accordance with the Board's report, such computation is hereby adopted, and it is

Ordered, adjudged and decided that there are overpayments in petitioner's income tax for 1925 of $16,921.52, and for 1926 of $182,832.

Enter.

Board of Tax Appeals, (Signed) John M. Sternhagen, Member.

Entered March 6, 1933.

[fol. 39] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Pressly R. Baldridge, Special Deputy Commissioner of Internal Revenue of the United States and Acting Commissioner of Internal Revenue, by his attorneys, Sewall Key, Head of the Tax Section of the Department of Justice, C. M. Charest, General Counsel, Bureau of Internal Revenue, and John D. Foley, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

The petitioner on review is the Acting Commissioner of Internal Revenue of the United States of America.

The respondent on review is a corporation organized and existing under the laws of the Imperial Parliament of Great [fol. 40] Britain with its registered office and place of business at Westminster House, 7, Millbank, London, S. W. 1, England. Its office and principal place of business in the

United States is now at No. 1600 West Hill Street, Louisville, Kentucky. At the time of the filing of its corporation income tax returns for the calendar years 1925 and 1926 with the United States Treasury authorities its principal office and place of business in the United States was at No. 535 Fifth Avenue, New York, New York. Its income tax returns for the calendar years 1925 and 1926 were duly filed with the Collector of Internal Revenue for the Third Collection District of New York, in the City of New York and State of New York, and within the Second Judicial Circuit of the United States.

II

The Commissioner of Internal Revenue determined that there were deficiencies in income tax due from respondent on review for the calendar years 1925 and 1926 in the respective amounts of $12,600.20 and $182,832.00, and on August 27, 1928, duly forwarded to respondent on review by registered mail notice of his said determination of deficiencies. The respondent on review duly filed a petition with the United States Board of Tax Appeals, hereinafter called the Board, praying for a redetermination of said deficiencies and said petition was duly docketed by the Board and given Docket No. 41224. The Commissioner of Internal Revenue duly filed his answer to the petition filed [fol. 41] by respondent on review under Docket No. 41224.

On or about November 16, 1931, the Commissioner of Internal Revenue and respondent, by their duly authorized attorneys, filed a stipulation of facts and on November 19, 1931, they filed a motion to submit the case upon said stipulation of facts. On March 9, 1932, the Board entered its memorandum opinion and on the same day entered its decision or order of redetermination wherein and whereby it found that there were deficiencies for the calendar years 1925 and 1926 in the respective amounts of $12,600.20 and $182,832.00. Subsequent to the entry of said decision the Board promulgated its interlocutory decision in the case of Stockholms Enskilda Bank, 25 B. T. A. 1328, and respondent on review thereupon moved for a reopening and reconsideration of the Board's decision in this case. The matter was set down for argument and was argued on or about August 10, 1932. Shortly prior to September 6, 1932, the Board vacated its decision or order of redetermination

of March 9, 1932, and on December 6, 1932, the Board promulgated its interlocutory decision in which it held that interest received in the calendar years 1925 and 1926, by respondent on review upon refunds of income and profits taxes paid for the calendar years 1917, 1918, and 1919, were not income from sources within the United States on the ground that the United States was not a resident of the United States, corporate or otherwise. On March 6, 1933, the Board entered its order of redetermination wherein and whereby it found that there were overpayments in in- [fol. 42] come tax for the calendar years 1925 and 1926 in the respective amounts of $16,921.51 and $182,832.00.

III

The petitioner on review says that in the Board's opinion and in its order of redetermination manifest error occurred and intervened to his prejudice, and he assigns the following errors and each of them, to wit:

1. The Board erred in holding that interest received by respondent upon refunds of Federal income and profits taxes was not income derived from sources within the United States.

2. The Board erred in holding that the United States is not a resident of the United States, corporate or otherwise.

3. The Board erred in holding that interest paid by the United States upon refunds of Federal income and profits taxes previously paid by respondent to the United States was not interest paid upon an obligation of the United States.

4. The Board erred in holding that the respondent had overpaid its income taxes for the calendar years 1925 and 1926.

Wherefore, the petitioner on review petitions that the decision of the Board be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a [fol. 43] transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the clerk of said Court for filing and that appropriate

action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

Sewall Key, Head of the Tax Section of the Department of Justice. (Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: —— ——, Special Attorney, Bureau of Internal Revenue.

LLd.

5/29/33.

Duly sworn to by C. M. Charest. Jurat omitted in printing.

[fol. 44] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW

To H. H. Shelton, Esq., Munsey Building, Washington, D. C.:

You are hereby notified that the Commissioner of In-
[fol. 45] ternal Revenue did, on the 29th day of May, 1933, filed with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 29th day of May, 1933.

(Signed) O. M. Charest, General Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 31st day of May 1933.

(Sgd.) H. H. Shelton, Attorney for Respondent on Review.

LLd.

5/29/33.

[fol. 46] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW

To British-American Tobacco Company, Limited, 1600 West Hill Street, Louisville, Kentucky.

You are hereby notified that the Commissioner of Internal Revenue did, on the 29th day of May, 1933, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 29th day of May, 1933.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue.

[fol. 47] Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 3rd day of June, 1933.

British American Tobacco Co., Ltd., (Sgd.) by H. M. Robertson, Attorney for Respondent on Review.

LLd.

5/29/33.

[fol. 48] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

PRÆCIPE FOR RECORD

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above entitled

cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
[fol. 49] 2. Pleadings before the Board,

(a) Amended petition filed October 29, 1928, together with copy of deficiency letter attached thereto.

(b) Answer to petition and amended petition filed on or about December 22, 1928.

3. Stipulation of facts filed on or about November 16, 1931.

4. Memorandum opinion entered March 9, 1932.

5. Decision entered March 9, 1932.

6. Order of August 22, 1932, vacating decision of March 9, 1932.

7. Interlocutory decision promulgated December 6, 1932.

8. Judgment entered March 6, 1933.

9. Petition for review filed May 29, 1933, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

10. Orders, if any, enlarging time for the transmission and delivery of the record not included in record.
[fol. 50] 11. This præcipe.

(Signed) E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue.

Service of a copy of the within præcipe is hereby admitted this 26th day of June, 1933.

(Sgd.) H. H. Shelton, Attorney for Respondent.

LLd.
6/9/33.

[fol. 51] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 52] In United States Circuit Court of Appeals for the Second Circuit

No. —

Commissioner of Internal Revenue, Petitioner,

vs.

British-American Tobacco Company, Ltd., Respondent

Motion for Substitution

Comes now Guy T. Helvering, Commissioner of Internal Revenue, and moves the court that he be substituted for David Burnet as petitioner herein, and in support of said motion respectfully shows:

1. That the resignation of said David Burnet, who was Commissioner of Internal Revenue when the petition for review was filed, was duly accepted and he ceased to be such officer on May 15, 1933.

2. That Guy T. Helvering was duly appointed and confirmed as Commissioner of Internal Revenue to succeed the said David Burnet; that he qualified as such officer and entered upon the duties of said office on June 6, 1933, since which date the said Guy T. Helvering has been and now is Commissioner of Internal Revenue.

3. That there is a substantial need for continuing and maintaining this proceeding and obtaining an adjudication of the questions involved, for otherwise the order of the United States Board of Tax Appeals herein sought to be reviewed will become final and the right to have the legality thereof determined will be extinguished.

This motion is made pursuant to the provisions of Sec. 11 of the Act of February 13, 1925, c. 229, 43 Stat. 941 (U. S. C., Title 28, Sec. 780).

Dated June 7, 1933.

Sewall Key, Special Assistant to the Attorney General, Attorney for Guy T. Helvering, Commissioner of Internal Revenue.

The undersigned attorney for respondent herein hereby expressly consents to the substitution sought by the above motion.

H. H. Shelton, Attorney for Respondent.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER OF SUBSTITUTION

Upon motion of Guy T. Helvering, Commissioner of Internal Revenue, expressly consented to by the respondent, it is hereby Ordered that said Guy T. Helvering, as such officer, be and he hereby is substituted for David Burnet, former Commissioner of Internal Revenue, and that this proceeding be so continued and maintained.

Wm. Parkin, Clerk.

Dated July 15, 1933.

[fol. 53] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1933

No. 150

Argued February 6, 1934. Decided March 5, 1934

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner,

v.

BRITISH-AMERICAN TOBACCO COMPANY, LTD., Respondent

Appeal from the United States Board of Tax Appeals

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

Petition by the Commissioner of Internal Revenue to review a judgment of the Board of Tax Appeals (27 B. T. A. 226). The Commissioner appeals. Judgment reversed.

Sewall Key and John H. McEvers, Sp. Assts. to Atty. Gen., for petitioner.

H. H. Shelton, of Washington, D. C. (John H. Jackson and Harrison M. Robertson, both of New York City, of counsel), for respondent.

OPINION

MANTON, Circuit Judge:

This is a petition to review a judgment entered against the Commissioner by the Board of Tax Appeals. It determined

that there was no deficiency with respect to income taxes of the respondent for the years 1925 and 1926. The question presented is whether the respondent was subject to a corporation tax, with respect to interest paid to it by the government in the years 1925 and 1926, upon refunds of income and profit taxes, illegally assessed against it, in the calendar years 1917, 1918, and 1919. The interest received was $12,600.20 in 1925 and $182,832 in 1926. The overpayments were $1,394,357.64.

The corporation reported these amounts on its tax returns for the years 1925 and 1926 as nontaxable income. Therefore, was the interest paid during 1925 and 1926, by the government, to the respondent, upon the overpayments of taxes, income from sources within the United States, within the meaning of sections 217 and 233 of the Revenue Act of 1926 (chapter 27, 44 Stat. 9, 30, 41 [26 U. S. C. A. §§ 958, 985]).

Section 1019 of the Revenue Act of 1924 (chapter 234, 43 Stat. 346 [26 U. S. C. A. § 153 note]) provides for the payment of interest at 6 per cent. on the allowance of a credit or refund of any tax erroneously collected. The Revenue Act of 1926, chapter 27, § 217 (a) 44 Stat. 30 (26 U. S. C. A. § 958(a), provides: "In the case of a nonresident alien individual * * * the following items of gross income shall be treated as income from sources within the United States: (1) Interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, not including (A) interest on deposits with persons carrying on the banking business paid to persons not engaged in business within the United States and not having an office or place of business therein, or (B) interest received from a resident alien individual, a resident foreign corporation, or a domestic corporation, when it is shown to the satisfaction of the Commissioner that less than 20 per centum of the gross income of such resident payor or domestic corporation has been derived from sources within the United States. * * *"

Section 217(c), 26 U. S. C. A. § 958(c), provides: "The following items of gross income shall be treated as income * * * other than that derived from sources within the United States as provided in paragraph (1) of subdivision (a)."

[fol. 54] Section 233(b), 44 Stat. 41, 26 U. S. C. A. § 985(b), provides: "In the case of a foreign corporation, gross income means only gross income from sources within the

United States, determined * * * in the manner provided in section 217 [section 958]."

The plan of the Revenue Act indicates that the income of foreign corporations is divided into two groups, (a) that derived from sources within the United States, and (b) that received from sources without the United States. The interest here involved was derived from sources within the United States.

But it is argued, by the respondent, that not all such interest derived from such sources is taxable, but only the interest of the types of obligation defined by the statute. It is said that the statute must be strictly construed, and on the analogy of decisions limiting the application of the word "obligations" in section 213, 26 U. S. C. A. § 954 [U. S. Trust Co. v. Anderson, 65 F. (2d) 575 (C. C. A. 2); American Viscose Corp. v. Comm'r, 56 F. (2d) 1033 (C. C. A. 3)] it is urged that the same words in section 217 (26 U. S. C. A. § 958) should be held not to include the statutory requirement of interest paid by the United States on refunded taxes. But the meaning given to the word used in one connection is not necessarily the meaning to be attributed to it when employed in other connections. It is a matter of legislative intent, and the legislative history of the two sections is not so nearly identical that Congress may be presumed to have intended the same thing in each. It is a fair inference that section 217 is the broader of the two. In its first form (as section 10 of the Revenue Act of 1916, 39 Stat. 765) it was apparently intended to extend the taxing power to situations not thought by the Attorney General (30 Ops. Attys. Gen. 435) to be included in the law as it then stood. Its present form, as indicated by the report of the Finance Committee of the Senate (Report No. 275, 67th Congress, 1st Sess. p. 16) is no retreat from that position, but rather a qualification and more explicit statement of that extension. We thus have revealed a purpose to enlarge the scope of the statute. It is only in keeping with that purpose to apply the statute to the obligation involved in the instant case.

The term "obligation" includes "any duty imposed by law" (Webster's New International Dictionary), and it is well settled that the popular and accepted import of the words furnishes the general rule for the interpretation of public laws. Woolford Realty Co. v. Rose, 286 U. S. 319,

327, 52 S. Ct. 568, 76 L. Ed. 1128; Old Colony R. Co. v. Comm'r, 284 U. S. 552, 560, 52 S. Ct. 211, 76 L. Ed. 484.

In U. S. Trust Co. v. Anderson, supra, we held that interest on condemnation awards was taxable as an obligation of a subdivision of a state. There is no substantial difference, in the viewpoint of taxation, between the obligation of a city to pay interest on an award and the obligation of the United States to pay interest on an overpayment of taxes, none of which were exempt later from taxation. In American Viscose Co. v. Comm'r, supra, the tax was imposed upon a domestic corporation for interets on refunded taxes.

The question remains as to whether the United States is a resident within the meaning of section 217. The United States is a corporation. Respublica v. Sweers, 1 Dall. 41, 44, 1 L. Ed. 29; United States v. Maurice, 2 Brock. (U. S.) 96, 109 Fed. Cas. No. 15747 (per Marshall, J.). As such corporate entity, it must have a corporate residence; that residence must be within the United States.

We are referred to Helvering v. Stockholms Enskilda Bank, 68 F. (2d) 407 (Vol. 1. Prentice-Hall, 1933, p. 2300, 529) Court of Appeals, District of Columbia, and State v. City of Trenton, 40 N. J. Law, 89 as being contrary to this view. In State v. City of Trenton, supra, turned on the intent of the Legislature, declared by the court to be manifest, that the debtor should not be released from taxation unless the tax could be collected from the creditor. The case at bar presents no such question. Helvering v. Stockholms Enskilda Bank, supra, rests heavily upon the determination of the New Jersey courts. We cannot agree with the prevailing opinion in saying that the United States is not a resident within the meaning of that term as used in section 217.

To be taxable as income, the interest received by the respondent must be regarded as interest on "an obligation of residents, corporate or otherwise." The statute does not declare the resident must be a corporation or an individual. The words are "corporate or otherwise." This language is sufficiently broad to embrace all conceivable entities, be they sovereign, corporate, or individual. There [fol. 55] is no difficulty with the conception that a sovereign is within the United States and it is axiomatic to say that a sovereign resides where it is sovereign.

It is unlikely that Congress was more solicitous of the welfare of foreign corporations than of domestic in the collection of taxes, and, if it was the intention to regard interest paid to a domestic corporation as income, we think it did not intend to exclude a foreign corporation from the same obligation. No sufficient reason is advanced for exempting a foreign corporation when a domestic corporation is taxed. It has long been Congress' desire to extend income taxes to all forms of taxable income. Heiner v. Colonial Trust Co., 275 U. S. 232, 235, 48 S. Ct. 65, 72 L. Ed. 256; Irwin v. Gavit, 268 U. S. 161, 166, 45 S. Ct. 475. 69 L. Ed. 897. And, indeed, it may well be said to be contrary to our nationalistic disposition to tax the one and exempt the other. It would require unmistakable language to carry conviction that Congress contemplated that corporations of foreign countries, doing business in the United States, in competition with domestic corporations and spending their incomes abroad, should be so favored.

By the Revenue Act of 1916 (c. 463, 39 Stat. 756), the Legislature not only sought to make the test of taxability of foreign corporations the "source" of the income, but it definitely had in mind the ruling of the Attorney General (30 Ops. Attys. Gen. 435) that, under the 1913 act (38 Stat. 166), a foreign corporation could carry on a business in the United States without being subject to a tax on income derived from stocks and bonds of a domestic corporation doing a domestic business or from obligations secured by mortgages on tangible property within the United States even though such obligations were held by such foreign corporations in the United States. Therefore it included the phrase "including interest on bonds, notes, or other interest-bearing obligations or residents, corporate or otherwise. * * *" 39 Stat. 765. Thus the Congress intended an all-inclusive and not restrictive taxation.

The history of the statute here in question indicates a purpose on the part of Congress to extend and make all-inclusive taxes upon income of foreign corporations derived from sources within the United States. Interest on an obligation of the United States is from a source within, and Congress intended to impose an income tax upon it. As said in Burnet v. Chicago Co., 285 U. S. 17, 52 S. Ct. 275, 277, 76 L. Ed. 587, the expression should be construed "so as to achieve, and not defeat, its (the legislature's) aim."

Congress exempted from the normal tax all interest received from obligations of the United States, incurred in the borrowing of money, but made a certain class thereof subject to the surtaxes and war and excess profits taxes.

A review of the history of section 236 of the Revenue Act of 1926, c. 27 (44 Stat. 43 [26 U. S. C. A. § 988]), here considered, discloses that it was enacted and re-enacted as a part of section 213 (26 U. S. C. A. § 954), and that at no time has it been considered or treated as part of section 217 (26 U. S. C. A. § 958). It had its origin in the Revenue Act of 1918, c. 18 (40 Stat. 1057). As to individuals, section 210 (page 1052) imposed a normal tax and section 211 imposed a surtax, while section 230 (page 1075) imposed a normal tax and section 301 (page 1088) imposed a war and excess profits tax upon corporations. Section 213 (40 Stat. 1065) defined the gross income of individuals and section 233 (page 1077) made section 213 applicable to corporations. Subdivision b of section 213 (40 Stat. 1065), it will be observed, does not exclude from gross income interest upon all obligations of the United States incurred in the borrowing of moneys. Relating to the tax upon individuals, section 216 (page 1069) provided that for the purpose of normal tax only there should be allowed credits (b) "The amount received as interest upon obligations of the United States * * * which is included in gross income under section 213." Section 236 (page 1080) contained a similar provision with respect to normal tax upon corporations. Thus there was exempted by Congress, both as to individuals and corporations, from the normal tax, all interest received from obligations of the United States incurred in the borrowing of money, but it made a certain class thereof subject to surtax and war and profit taxes. War and profit taxes were carried forward in the Revenue Act of 1921, § 301, c. 136 (42 Stat. 272), for the year 1921 only, and sections 213, 216, and 236 (42 Stat. 237, 242, 257) were carried forward without substantial change. The war and excess profits tax was in effect for the year 1921 and no longer. The provisions of sections 213, 216, and 236 were without limitation and were subsequently carried forward into the Revenue Act of 1924, c. 234 (43 Stat. 253), and 1926 (26 [fol. 56] U. S. C. A. §§ 954, 958 and notes, 988). So far as corporations are concerned, sections 213, 233, and 217 of the 1924 and 1926 acts (26 U. S. C. A. §§ 954, and note 985,

958, 958 and note) includes in "gross income" interest upon certain of the bonds of the United States issued in the borrowing of money, and section 236 takes it out. Congress, we think, used the word "obligations" in section 236 in reference to those obligations the interest upon which it specifically included in gross income.

The history of this taxation statute warrants the approval of construction which results in consistency, and which should be adopted, making this, a foreign corporation, taxable as a domestic corporation has been held to be taxable. American Viscose Corp. v. Comm'r, supra.

Judgment reversed.

[fol. 57] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

BRITISH-AMERICAN TOBACCO COMPANY, LTD., Respondent

Appeal from the United States Board of Tax Appeals

JUDGMENT—Filed March 12, 1934

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is reversed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 58] [File endorsement omitted.]

[fol. 59] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 39] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 7, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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APR 23 193
CHARLES ELMORE C
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. [redacted] 24

BRITISH-AMERICAN TOBACCO COMPANY, LTD.,
Petitioner.

v.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF.

H. H. SHELTON,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. .....

BRITISH-AMERICAN TOBACCO COMPANY, LTD.,
Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

British-American Tobacco Company, Ltd., prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above entitled case on March 12, 1934.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 13), affirming the action of the Commissioner, is unreported. Its subsequent opinion (R. 15), reversing its former opinion and

the action of the Commissioner, is reported in 27 B. T. A. 226. The opinion of the Circuit Court of Appeals for the Second Circuit is not yet officially reported, but is printed in full as an appendix to this petition and appears in the record at page 32.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered March 12, 1934. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

Whether interest paid by the United States pursuant to Section 1116 (a) of the Revenue Act of 1926 to a foreign corporation upon a refund of taxes previously overpaid is included within the category of "interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise" of the United States within the meaning of Sections 217 and 233 of the Revenue Act of 1926.

Whether such interest is exempt from taxation under the provisions of Section 213 (b) (4) of the Revenue Act of 1926.

Whether, if such interest is properly included in the gross income of a foreign corporation pursuant to sections 217 and 233 of the Revenue Act of 1926, and is not exempt pursuant to Section 213 (b) (4), such corporation is not entitled to a "credit" against its income in the amount of such interest pursuant to Section 236 of the Revenue Act of 1926.

STATUTES INVOLVED.

Revenue Act of 1926, c. 27, 44 Stat. 9.

Sec. 233 (b). In the case of a foreign corporation, gross income means only gross income from sources within the United States, determined (except in the case of insurance companies subject to the tax imposed by sections 243 or 246) in the manner provided in section 217.

Sec. 217 (a). In the case of a nonresident alien individual or of a citizen entitled to the benefits of section 262, the following items of gross income shall be treated as income from sources within the United States:

(1) Interest on bonds, notes, or other interest bearing obligations of residents, corporate or otherwise, not including

(A) interest on deposits with persons carrying on the banking business paid to persons not engaged in business within the United States and not having an office or place of business therein, or

(B) interest received from a resident alien individual, a resident foreign corporation, or a domestic corporation, when it is shown to the satisfaction of the Commissioner that less than 20 per centum of the gross income of such resident payor or domestic corporation has been derived from sources within the United States, as determined under the provisions of this section, for the three-year period ending with the close of the taxable year of such payor preceding the payment of such interest, or for such part of such period as may be applicable:

* * * * * * *

(c) The following items of gross income shall be treated as income from sources without the United States:

(1) Interest other than that derived from sources within the United States as provided in paragraph (1) of subdivision (a); * * *.

Sec. 213. For the purposes of this title, except as otherwise provided in section 233—

* * * * * * *

(b) The term "gross income" does not include the following items, which shall be exempt from taxation under this title:

* * * * * * *

(4) Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; or

(B) securities issued under the provisions of the Federal Farm Loan Act, or under the provisions of such Acts as amended; or

(C) the obligations of the United States or its possessions.

Every person owning any of the obligations or securities, enumerated in Clause (A), (B), or (C) shall, in the return required by this title, submit a statement showing the number and amount of such obligations and securities owned by him and the income received therefrom, in such form and with such information as the Commissioner may require.

In the case of obligations of the United States issued after September 1, 1917 (other than postal savings certificates of deposit), the interest shall be ex-

empt only if and to the extent provided in the respective Acts authorizing the issue thereof as amended and supplemented, and shall be excluded from gross income only if and to the extent it is wholly exempt to the taxpayer from income taxes; * * *.

Sec. 236. For the purposes only of the tax imposed by section 230 there shall be allowed the following credits:

(a) The amount received as interest upon obligations of the United States which is included in gross income under section 233; * * *

Sec. 1116 (a) Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in the case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment made under the Revenue Act of 1921, the Revenue Act of 1924, or this Act, then to the date of the assessment of that amount.

STATEMENT OF CASE.

During the years 1925 and 1926, petitioner, a foreign corporation with offices in New York City, received from the United States $132,407.17 and $1,394,357.64, respectively, interest upon overpayment of Federal income and excess profits taxes. In its income tax returns for those years the petitioner reported the money so received as nontaxable income. The Commissioner held that it was taxable

and determined deficiencies accordingly (R. 5). An appeal was taken to the Board of Tax Appeals (R. 3), where, by decision entered March 9, 1932, the action of the Commissioner was affirmed (R. 13). On August 22, 1932, that decision was vacated and set aside (R. 15), and on March 3, 1933, the Board, with three members dissenting, reversed its previous decision and the Commissioner's determination and held that the interest so received did not constitute taxable income (R. 24). The Commissioner filed a petition for a review of the judgment of the Board of Tax Appeals with the Circuit Court of Appeals for the Second Circuit (R. 25), which Court reversed the judgment of the Board of Tax Appeals (R. 32). The Circuit Court of Appeals held expressly that the interest received by the petitioner was (a) interest upon an "obligation" of the United States, and (b) that the United States was to be regarded as a resident of the United States within the meaning of the statute. By necessary implication the Circuit Court of Appeals held (c) that the interest was not exempt from taxation under the provisions of Section 213 (b) (4), and (d) that the interest was not such as to entitle the petitioner to a credit in the amount thereof, pursuant to Section 236.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that the interest paid to the petitioner upon the refund of taxes previously overpaid fell within the category of "interest on bonds, notes, or other interest bearing obligations" within the meaning of Sections 217 and 233 of the Revenue Act of 1926.

(2) In holding that the United States was a resident of the United States within the meaning of Sections 217 and 233 of the Revenue Act of 1926.

(3) In holding that such interest was not exempt from taxation under the provisions of Section 213 (b) (4) of the Revenue Act of 1926.

(4) In holding that the petitioner was not entitled to a credit against its income in the amount of such interest, pursuant to Section 236 of the Revenue Act of 1926.

(5) In reversing the judgment of the Board of Tax Appeals.

BRIEF IN SUPPORT OF PETITION.

The decision below, with respect to the question referred to in Specification of Errors (2) *supra*, is in direct conflict with the decision of the Court of Appeals of the District of Columbia in *Helvering vs. Stockholms Enskilda Bank*, reported in 68 F. (2nd) 407. The conflict is expressly recognized in the opinion below (see page 12, *infra*). This question, if decided favorably to petitioner, would be decisive of the case.

A petition for a writ of certiorari to review the decision of the Court of Appeals of the District of Columbia in *Helvering vs. Stockholms Enskilda Bank*, has been filed in this Court by the Solicitor General.

The question presented is of general importance and one which, in view of the conflict, should be settled by a decision of this Court.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

H. H. SHELTON,
Attorney for Petitioner.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

against

BRITISH-AMERICAN TOBACCO COMPANY, LTD.,
Respondent.

Before:

MANTON, AUGUSTUS N. HAND and CHASE,
Circuit Judges.

Petition by the Commissioner of Internal Revenue to review a judgment of the Board of Tax Appeals (27 B. T. A. 226). The Commissioner appeals. Judgment reversed.

SEWALL KEY, ESQ.,
JOHN H. MCEVERS, ESQ.,
Special Assistants to the Attorney General.

H. H. SHELTON, ESQ.,
Attorney for Respondent.

JOHN H. JACKSON, ESQ.,
HARRISON M. ROBERTSON, ESQ.,
Of Counsel.

MANTON, *Circuit Judge*:

This is a petition to review a judgment entered against the Commissioner by the Board of Tax Appeals. It determined that there was no deficiency with respect to in-

come taxes of the respondent for the years 1925 and 1926. The question presented is whether the respondent was subject to a corporation tax, with respect to interest paid to it by the government in the years 1925 and 1926, upon refunds of income and profit taxes, illegally assessed against it, in the calendar years 1917, 1918 and 1919. The interest received was $12,600.20 in 1925 and $182,832.00 in 1926. The overpayments were $1,394,357.64.

The corporation reported these amounts on its tax returns for the years 1925 and 1926 as non-taxable income. Therefore, was the interest paid during 1925 and 1926, by the government, to the respondent upon the over-payments of taxes, income from sources within the United States, within the meaning of Sections 217 and 233 of the Revenue Act of 1926? (C. 27, 44 Stat. 9.)

Section 1019 of the Revenue Act of 1924 (c. 234, 43 Stat. 346) provides for the payment of interest at 6% on the allowance of a credit or refund of any tax erroneously collected. The Revenue Act of 1926 (c. 27, Sec. 217 [a] 44 Stat. 30) provides:

> "In the case of a nonresident alien individual * * * the following items of gross income shall be treated as income from sources within the United States: (1) Interest on bonds, notes or other interest-bearing obligations of residents, corporate or otherwise, not including (A) interest on deposits with persons carrying on the banking business, paid to persons not engaged in business within the United States and not having an office or place of business therein, or (b) interest received from a resident alien individual, a resident foreign corporation, or a domestic corporation when it is shown to the satisfaction of the Commissioner that less than 20 per centum of the gross income of such resident payor or domestic corporation has been derived from sources within the United States * * *."

Section 217 (c) provides:

> "The following items of gross income shall be treated as income other than that derived from sources within the United States as provided in para. (1) of subdiv. (a)".

Section 233 (b), 44 Stat. 41, provides:

> "In the case of a foreign corporation, gross income means only gross income from sources within the United States, determined * * * in the manner provided in Section 217".

The plan of the Revenue Act indicates that the income of foreign corporations is divided into two groups—(a) that derived from sources within the United States and (b) that received from sources without the United States. The interest here involved was derived from sources within the United States.

But it is argued, by the respondent, that not all such interest derived from such sources is taxable but only the interest of the types of obligation defined by the statute. It is said that the statute must be strictly construed and on the analogy of decisions limiting the application of the word "obligations" in section 213 (*U. S. Trust Co. v. Anderson*, 65 Fed. [2d] 575 [C. C. A. 2]; *Amer. Viscose Corp. v. Commr.*, 56 Fed. [2d] 1033 [C. C. A. 3], it is urged that the same words in Section 217 should be held not to include the statutory requirement of interest paid by the United States on refunded taxes. But the meaning given to the word used in one connection is not necessarily the meaning to be attributed to it when employed in other connections. It is a matter of legislative intent, and the legislative history of the two sections is not so nearly identical that Congress may be presumed to have intended the same thing in each. It is a fair inference that Sec. 217 is the broader of the two. In its first form (as Sec. 10 of the Rev-

enue Act of 1916), it was apparently intended to extend the taxing power to situations not thought by the Attorney General (30 Opinions A. G. 435) to be included in the law as it then stood. Its present form, as indicated by the report of the Finance Committee of the Senate (Report No. 275, 67th Congress, 1st Sess., P. 16) is no retreat from that position but rather a qualification and more explicit statement of that extension. We thus have revealed a purpose to enlarge the scope of the statute. It is only in keeping with that purpose to apply the statute to the obligation involved in the instant case.

The term "obligation" includes "any duty imposed by law" (Webster's New International Dictionary), and it is well settled that the popular and accepted import of the words furnishes the general rule for the interpretation of public laws. *Woolford Realty Co. v. Rose,* 286 U. S. 319, 327; *Old Colony R. Co. v. Commr.,* 284 U. S. 552, 560.

In *U. S. Trust Co. v. Anderson* (*supra*), we held that interest on condemnation awards was taxable as an obligation of a subdivision of a state. There is no substantial difference, in the viewpoint of taxation, between the obligation of a city to pay interest on an award and the obligation of the United States to pay interest on an overpayment of taxes, none of which were exempt later from taxation. In *American Viscose Co. v. Commr.* (*supra*), the tax was imposed upon a domestic corporation for interest on refunded taxes.

The question remains as to whether the United States is a resident within the meaning of Sec. 217. The United States is a corporation. *Republica v. Sweers,* 1 Dall. 41, 44; *United States v. Maurice,* 2 Brock. (U. S.), 96, 109 per MARSHALL, J.). As such corporate entity, it must have a corporate residence; that residence must be within the United States.

We are referred to *Helvering v. Stockholms Enskilda Bank* (Vol. 1, Prentice-Hall, 1933, pp. 2300.529), Court

of Appeals, District of Columbia, and *State v. City of Trenton* (40 N. J. L. 89), as being contrary to this view. The *State v. City of Trenton, supra,* turned on the intent of the legislative, declared by the court to be manifest, that the debtor should not be released from taxation unless the tax could be collected from the creditor. The case at bar presents no such question. *Helvering v. Stockholms Enskilda Bank, supra,* rests heavily upon the determination of the New Jersey courts. We cannot agree with the prevailing opinion in saying that the United States is not a resident within the meaning of that term as used in Sec. 217.

To be taxable as income, the interest received by the respondent must be regarded as interest on "an obligation of residents, corporate or otherwise." The statute does not declare the resident must be a corporation or an individual. The words are "corporate or otherwise." This language is sufficiently broad to embrace all conceivable entities, be they sovereign, corporate or individual. There is no difficulty with the conception that a sovereign is within the United States and is axiomatic to say that a sovereign resides where it is sovereign.

It is unlikely that Congress was more solicitous of the welfare of foreign corporations than of domestic in the collection of taxes, and if it was the intention to regard interest paid to a domestic corporation as income, we think it did not intend to exclude a foreign corporation from the same obligation. No sufficient reason is advanced for exempting a foreign corporation when a domestic corporation is taxed. It has long been Congress' desire to extend income taxes to all forms of taxable income. *Heiner v. Colonial Trust Co.,* 275 U. S. 232, 235; *Irwin v. Gavit,* 268 U. S. 161, 166. And, indeed, it may well be said to be contrary to our nationalistic disposition to tax the one and exempt the other. It would require unmistakable language to carry conviction that Congress contemplated that cor-

porations of foreign countries, doing business in the United States, in competition with domestic corporations and spending their incomes abroad, should be so favored.

By the Revenue Act of 1916 (c. 463, 39 Stat. 756), the legislature not only sought to make the test of taxability of foreign corporations the "source" of the income, but it definitely had in mind the ruling of the Attorney General (30 Opinions A. G. 435) that, under the 1913 Act, a foreign corporation could carry on a business in the United States without being subject to a tax on income derived from stocks and bonds of a domestic corporation doing a domestic business or from obligations secured by mortgages on tangible property within the United States even though such obligations were held by such foreign corporations in the United States. Therefore it included the phrase "including interest on bonds, notes or other interest-bearing obligations of residents, corporate or otherwise, * * *." Thus the Congress intended an all-inclusive and not restrictive taxation.

The history of the statute here in question indicates a purpose on the part of Congress to extend and make all-inclusive taxes upon income of foreign corporations derived from sources within the United States. Interest on an obligation of the United States is from a source within and Congress intended to impose an income tax upon it. As said in *Burnett v. Chicago Co.* (285 U. S. 17), the expression should be construed "so as to achieve and not to defeat, its (the legislature's) aim". Congress exempted from the normal tax all interest received from obligations of the United States, incurred in the borrowing of money but made a certain class thereof subject to the surtaxes and war and excess profits taxes.

A review of the history of Sec. 236 of the Revenue Act of 1926, c. 27 (44 Stat. 43), here considered, discloses that it was enacted and re-enacted as a part of Sec. 213 and that at no time has it been considered or treated as part of

Sec. 217. It had its origin in the Revenue Act of 1918, c. 18 (40 Stat. 105). As to individuals, Sec. 210 imposed a normal tax and Sec. 211 imposed a surtax, while Sec. 230 imposed a normal tax and Sec. 301 imposed a war and excess profits tax upon corporations. Section 213 defined the gross income of individuals and Sec. 233 made Sec. 213 applicable to corporations. Subdiv. b of Sec. 213, it will be observed, does not exclude from gross income interest upon all obligations of the United States incurred in the borrowing of moneys. Relating to the tax upon individuals, Sec. 216 provided that for the purpose of normal tax only there should be allowed credits (b) "The amount received as interest upon obligations of the United States * * * which is included in gross income under Sec. 213". Section 236 contained a similar provision with respect to normal tax upon corporations. Thus there was exempted by Congress, both as to individuals and corporations, from the normal tax, all interest received from obligations of the United States incurred in the borrowing of money, but it made a certain class thereof subject to surtax and war and profit taxes. War and profit taxes were carried forward in the Revenue Act of 1921, Sec. 301, c. 136 (42 Stat. 272), for the year 1921 only, and Sections 213, 216 and 236 were carried forward without substantial change. The war and excess profits tax was in effect for the year 1921 and no longer. The provisions of Sections 213, 216 and 236 were without limitation and were subsequently carried forward into the Revenue Act of 1924, c. 234 (43 Stat. 253) and 1926. So far as corporations are concerned, Sections 213, 233 and 217 of the 1924-1926 Acts includes in "gross income" interest upon certain of the bonds of the United States issued in the borrowing of money, and Section 236 takes it out. Congress, we think, used the word "obligations" in Section 236 in reference to those obligations the interest upon which it specifically included in gross income.

The history of this taxation statute warrants the approval

of construction which results in consistency and which should be adopted, making this, a foreign corporation, taxable as a domestic corporation has been held to be taxable. *American Viscose Corp. v. Commr., supra.*

Judgment reversed.

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SEP 29 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 24.

BRITISH-AMERICAN TOBACCO COMPANY, LTD.,
Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER

H. H. SHELTON,
Attorney for Petitioner.

JOHN H. JACKSON,
HAIG H. DAVIDIAN,
Of Counsel.

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GUY T. HELVERING, Commissioner of Internal Revenue.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 32) is reported at 69 Fed. (2d) 528. The opinion of the Board of Tax Appeals (R. 15) is reported in 27 B. T. A. 226. A former opinion of the Board of Tax Appeals (R. 13), which was reversed by its decision reported in 27 B. T. A. 226, is unreported.

Jurisdiction.

The judgment below was entered March 12, 1934 (R. 38). The petition for a writ of certiorari was filed April

23, 1934 and was granted May 7, 1934. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

Whether interest paid by the United States pursuant to Section 1116 (a) of the Revenue Act of 1926 to a foreign corporation upon a refund of taxes previously overpaid is included in the category of "interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise" of the United States within the meaning of Sections 217 and 233 of the Revenue Act of 1926.

Whether such interest is exempt from taxation under the provisions of Section 213 (b) (4) (C) of the Revenue Act of 1926.

Whether, if such interest is properly included in the gross income of a foreign corporation pursuant to Sections 217 and 233 of the Revenue Act of 1926, such corporation is not entitled to a "credit" against its income in the amount of such interest pursuant to Section 236 of the Revenue Act of 1926.

Statutes Involved.

Revenue Act of 1926.

"TAX ON CORPORATIONS.

Sec. 230 (a) In lieu of the tax imposed by Section 230 of the Revenue Act of 1924 there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

(1) For the calendar year 1925, 13 per centum of the amount of the net income in excess of the credits provided in Sections 236 and 263; and

(2) For each calendar year thereafter, 13½ per centum of such excess amount."

(U. S. C. App., Title 26, Sec. 981.)

"GROSS INCOME DEFINED.

Sec. 213. For the purposes of this title, except as otherwise provided in Section 233:

(a) The term 'gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme Court and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, of the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or

from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or

gains or profits and income derived from any source whatever.

"The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period.

"(b) The term 'gross income' does not include the following items, which shall be exempt from taxation under this title:

* * * * * * * *

"(4) Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; or

"(B) securities issued under the provisions of the Federal Farm Loan Act, or under the provisions of such Act as amended; or

"(C) the obligations of the United States or its possessions.

"Every person owning any of the obligations or securities enumerated in Clause (A), (B), or (C) shall, in the return required by this title, submit a statement showing the number and amount of such obligations and securities owned by him and the income received therefrom, in such form and with such information as the Commissioner may require.

"In the case of obligations of the United States issued after September 1, 1917 (other than postal savings certificates of deposit), the interest shall be exempt only if and to the extent provided in the respective Acts authorizing the issue thereof as amended and supplemented, and shall be excluded from gross income only if and to the extent it is wholly exempt to the taxpayer from income taxes; * * *.

(U. S. C. App., Title 26, Sec. 954.)

"GROSS INCOME OF CORPORATIONS DEFINED.

"Sec. 233 (a). In the case of a corporation subject to the tax imposed by section 230 the term 'gross income' means the gross income as defined in sections 213 and 217,

except that mutual marine insurance companies shall include in gross income the gross premiums collected and received by them, less amounts paid for reinsurance.

"(b) In the case of a foreign corporation, gross income means only gross income from sources within

the United States, determined (except in the case of insurance companies subject to the tax imposed by sections 243 or 246) in the manner provided in section 217.

(U. S. C. App., Title 26, Sec. 985.)

"NET INCOME OF NONRESIDENT ALIEN INDIVIDUALS.

"Sec. 217 (a) In the case of a nonresident alien individual or of a citizen entitled to the benefits of section 262, the following items of gross income shall be treated as income from sources within the United States:

"(1) Interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, not including

"(A) interest on deposits with persons carrying on the banking business paid to persons not engaged in business within the United States and not having an office or place of business therein, or

"(B) interest received from a resident alien individual, a resident foreign corporation, or a domestic corporation, when it is shown to the satisfaction of the Commissioner that less than 20 per centum of the gross income of such resident payor or domestic corporation has been derived from sources within the United States, as determined under the provisions of this section, for the three-year period ending with the close of the taxable year of such payor preceding the payment of such interest, or for such part of such period as may be applicable;

* * * * * * * *

"(c) The following items of gross income shall be treated as income from sources without the United States:

"(1) Interest other than that derived from

sources within the United States as provided in paragraph (1) of subdivision (a); * * *.

(U. S. C. App., Title 26, Sec. 958.)

"Sec. 236. For the purpose only of the tax imposed by section 230 there shall be allowed the following credits:

"(a) The amount received as interest upon obligations of the United States which is included in gross income under section 233; * * *

(U. S. C. App., Title 26, Sec. 988.)

"Sec. 1116 (a) Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in the case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment made under the Revenue Act of 1921, the Revenue Act of 1924, or this Act, then to the date of the assessment of that amount."

(U. S. C. App., Title 26, Sec. 153.)

Statement.

During the years 1925 and 1926, petitioner, a foreign corporation with an office in New York City, received from the United States $132,407.17 and $1,394,357.64, respectively, interest upon overpayment of Federal income and excess profits taxes (R. 11, 12). In its income tax returns for those years the petitioner reported the money so received as non-taxable income (R. 11, 12). The Commis-

sioner held that it was taxable and determined deficiencies accordingly. An appeal was taken to the Board of Tax Appeals, where, by decision entered March 9, 1932, the action of the Commissioner was affirmed (R. 14). On August 22, 1932, that decision was vacated and set aside (R. 15), and the Board, with three members dissenting, reversed its previous decision and the Commissioner's determination and held that the interest so received did not constitute taxable income. The Commissioner filed a petition for a review of the judgment of the Board of Tax Appeals with the Circuit Court of Appeals for the Second Circuit, which Court reversed the judgment of the Board of Tax Appeals (R. 38). The Circuit Court of Appeals held expressly that the interest received by the petitioner was (a) interest upon an "obligation" of the United States, and (b) that the United States was to be regarded as a resident of the United States within the meaning of the statute (R. 38). By necessary implication, the Circuit Court of Appeals held (c) that the interest was not exempt from taxation under the provisions of Section 213 (b) (4) and (d) that the interest was not such as to entitle the petitioner to a credit in the amount thereof, pursuant to Section 236.

Specification of Errors to Be Urged.

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that the interest paid to the petitioner upon the refund of taxes previously overpaid fell within the category of "interest on bonds, notes, or other interest-bearing obligations" within the meaning of Sections 217 and 233 of the Revenue Act of 1926.

(2) In holding that the United States was a resident of the United States within the meaning of Section 217 of the Revenue Act of 1926.

(3) In holding that such interest was not exempt from taxation under the provisions of Section 213 (b) (4) (C) of the Revenue Act of 1926.

(4) In holding that the petitioner was not entitled to a credit against its income in the amount of such interest, pursuant to Section 236 of the Revenue Act of 1926.

(5) In reversing the judgment of the Board of Tax Appeals.

Summary of Argument.

I. Foreign corporations are taxable only upon such interest as clearly falls within the precise definitions of Section 217, all other interest received by such corporations being expressly excluded from the field of taxability. The only class of taxable income into which the interest on the refunds here involved might fall is "interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise" of the United States. The word "obligations" as used in Section 217 has the meaning of duties originating in contracts and does not include statutory duties such as the duty to refund taxes illegally collected. This definition is dictated (a) by the rule of strict construction, which is applicable because this is a provision imposing a tax, (b) by the rule of *ejusdem generis,* which requires that the word "obligations" be likened to "bonds" and "notes", and (c) by the logical requirement of consistency, since the word "obligations" has been held to have the narrower meaning in every other provision of the same statute which has been the subject of judicial decision. The last ground assumes that the

decisions referred to, which are decisions by Circuit Courts of Appeal in which this Court has denied certiorari (*American Viscose Corporation* v. *Commissioner,* 56 F. (2d) 1033, certiorari denied 287 U. S. 615; *United States Trust Co. of New York* v. *Anderson,* 65 Fed. (2d) 575, certiorari denied 290 U. S. 683), are correctly decided. If they are not correctly decided, it will be clear that the petitioner is entitled to a reversal of the judgment under other provisions of the statute.

II. Even if these refunds are "obligations of the United States", the income does not fall within the taxable class because the United States is not a "resident" of the United States. The petitioner relies (a) upon the ordinary significance of the word "resident", and (b) upon the propositions that it is apparent from the Revenue Act of 1926 as a whole that wherever Congress intended a reference to the United States, explicit words expressing that intention were used; and that the word "resident" is never used in the statute in such a sense as to include the United States.

III. If the word "obligations" as used in Section 217 is given the broad meaning which would make this income taxable, the same meaning must be given to the same word in Section 213 (b) (4) (C), and the interest is hence expressly exempt from taxation, *i. e., American Viscose Corporation* v. *Commissioner* (*supra*), and *United States Trust Co. of New York* v. *Anderson* (*supra*) were wrongly decided. The same rule of construction is applicable to the two sections and the context affords no basis for a differentiation of meaning.

IV. It is the intention of the Revenue Act of 1926 unequivocally expressed in Section 213, relating to "exemp-

tions'' and Section 236, relating to ''credits'', to exclude from the income of foreign corporations upon which the corporation income tax is imposed, all interest which may fall within any possible definition of ''interest upon obligations of the United States''. The plain terms of the statute and the history of the Federal tax legislation from 1918 to 1926 show clearly that such interest was never intended to be subjected to any taxation, except the war-profits and excess-profits tax which was enacted in 1918 and ceased to be in effect after 1921, and the tax imposed by Section 220.

I.

The word ''obligations'' as used in Section 217 (a) (1), relating to foreign corporations and non-resident aliens should be construed in the sense of contractual duties and not in so broad a sense as to embrace statutory duties such as the duty to refund taxes illegally collected.

This proposition rests upon three grounds.

1. **Section 217 (a) (1) is a provision defining specific subjects of taxation and must hence be strictly construed in favor of the taxpayer.**

Taxation of foreign taxpayers, *i. e.*, foreign corporations and non-resident aliens, follows a scheme essentially different from that applicable to domestic taxpayers, *i. e.*, domestic corporations, citizens and residents. In the case of domestic taxpayers, the statute includes in gross income every conceivable form of income which Congress has the power to tax. Section 213, which is controlling with respect to domestic taxpayers, provides in sub-section (a):

> "The term 'gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or
>
> from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property;
>
> also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or
>
> gains or profits and income derived from any source whatever."

Certain exemptions are provided for in sub-section (b) of Section 213; but these are exceptions to the general rule of taxability. The exceptions are expressed in specific language.

The basis for taxation of foreign taxpayers is in sharp contrast with these provisions applicable to domestic taxpayers. With respect to interest, the contrast is particularly marked. It may fairly be said that so far as interest received by foreign taxpayers is concerned, taxability is the exception instead of the rule. All interest which is not included within precise definitions is comprehensively excluded. The statute provides (Sec. 233 (b)) "In the case of a foreign corporation, gross income means *only* gross income from sources within the United States, determined * * * in the manner provided in Section 217", and Section 217 specifically sets forth the items of income which *shall be* treated as income from sources within the United States, specifying in the case of interest only "interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise". (Sec. 217 (a) (1).) Section 217 (c) then provides: "The following items of gross income *shall be* treated as income from sources without the United States: (1) Interest

other than that derived from sources within the United States as provided in paragraph (1) of sub-division (a);" (Italics ours.)

It is clear from the foregoing that Sections 217 and 233 are provisions imposing a tax and defining the subjects of taxation, not provisions for exemption. They are hence to be construed strictly against the government and in favor of the taxpayer.

United States v. *Merriam*, 263 U. S. 179;
Reinecke v. *Northern Trust Company*, 278 U. S. 339;
Burnet v. *Niagara Falls Brewing Co.*, 282 U. S. 648;
Gould v. *Gould*, 245 U. S. 151.

It follows that the words "interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise" should be held to include interest on refunds of taxes illegally collected only if there be no fair doubt as to whether such interest falls within the specific terms of the statute.

It cannot be said that the word "obligation" includes, without a fair doubt, the statutory duty of the United States to pay interest on illegally collected taxes. As used in the particular statute now under consideration, two recent cases recognize that the word is variable in meaning and the necessity, in order to fix its meaning, for determining the appropriate canon of construction.

United States Trust Co. of New York v. *Anderson*, 65 F. (2d) 575, certiorari denied 290 U. S. 683;
American Viscose Corporation v. *Commissioner*, 56 F. (2d) 1033; certiorari denied 287 U. S. 615.

In *United States Trust Co. of New York* v. *Anderson* (*supra*), the rule of strict construction was found applicable

and under the influence of that rule the word "obligations" was held not to include in its meaning the duty of a city to pay an award in condemnation proceedings. In *American Viscose Corporation* v. *Commissioner* (*supra*), it was held similarly not to include the statutory duty of the United States to refund taxes illegally collected.

In *United States Trust Co. of New York* v. *Anderson* (*supra*), the Court at page 577 said:

> "In determining the scope of the word we must bear in mind the settled rule of construction that 'tax exemptions are never lightly to be inferred' * * * and will not be applied to a particular case unless granted in the statute in plain terms * * *."

In *American Viscose Corporation* v. *Commissioner* (*supra*), the Court at page 1033 said:

> "The Tax Board, following the principle stated in *Kansas City Southern Railway Co., et al.* v. *Commissioner*, 16 B. T. A. 665, held this refund was not exempt by the act. We agree with that conclusion."

The *Kansas City Southern Railway* case involved the application of the rule of strict construction and it is to be inferred that that was the "principle" to which the Court referred.

It is true that the reason for applying the rule of strict construction in the cited cases is not the same as in the instant case. In the cited cases, arising under Section 213 (b), strict construction was adopted because an exemption from taxation was involved; in the instant case, arising under Sections 233 and 217, strict construction is to be adopted because of the rule relating to statutes imposing taxation. But, whatever the reason for it, the rule is the same in both cases.

It may also be true that it does not necessarily follow from the application of the same rule of construction that exactly the same meaning must be given to the word "obligation" in the two different provisions of the statute. There may be more than two shades of meaning in the same word, and the context or the probable purpose of the enactment may indicate that the line between what is included and what is excluded is to be placed differently in the two cases, notwithstanding the application of the same rule of construction. It will be found, however, that in the two cases now the subject of comparison, the line of demarcation for the definition is to be given the same location, *i. e.*, between duties arising from contract and those imposed by force of law. It will be convenient to defer the discussion of this question until the provisions of Section 217 (a) have been analyzed and the precise limitations of the meaning of the word "obligation", as used therein, determined with the aid of the rule of *ejusdem generis.*

2. **The rule of ejusdem generis is applicable to the construction of Section 217 (a) (1).**

Section 217 (a) (1) imposes the tax on interest on "*bonds, notes,* and other interest-bearing obligations". The word "obligations" must therefore be assimilated to something in the nature of bonds and notes.

> *Goldsmith* v. *United States,* 42 F. (2d) 133, certiorari denied, 51 S. Ct. 26.

Other provisions of Section 217 make a more precise definition possible. Section 217 (a) (1) (A) excludes from the class of taxable interest "interest on deposits with persons carrying on the banking business paid to persons not engaged in business within the United States and not having an office or place of business therein". The petitioner and

the respondent agree that this exception would not have been thought necessary if bank deposits had not been considered within the category of "obligations". But if bank deposits are regarded as obligations, it is manifest that the word is broader in scope than instruments given for borrowed money. It follows that in order to give full effect, on the one hand, to the limitation of meaning indicated by the words "bonds" and "notes", and, on the other hand, to the extension of meaning required in order to include bank deposits, obligations must be defined as including all duties contractual in origin, but excluding statutory duties.

We return now to the exemption provisions of Section 213 (b) for the purpose, if possible, of defining with the same degree of precision the word "obligation" as used therein. If the *United States Trust Co. of New York* case (*supra*) and the *American Viscose Corporation* case (*supra*) are accepted as authorities, statutory duties are excluded from the exempted class of "obligations" under this section. In those cases the question whether debts not arising from borrowing were within the definition, was not involved, but there are dicta in the opinions which suggest that the exemption should be so limited. It will be seen, however, that such a narrow limitation would be inconsistent with a controlling expression of the legislative will. We call the Court's attention to Article 77, Regulation 62 of the Treasury Department, adopted in 1922, which was apparently overlooked by counsel in the presentation both of the *United States Trust Co. of New York* case (*supra*) and the *American Viscose Corporation* case (*supra*). This regulation reads as follows:

> "Art. 77. INTEREST UPON UNITED STATES OBLIGATIONS. * * * Interest credited to postal savings accounts upon moneys deposited in postal savings banks is exempt from income tax * * *. (Art. 77, Reg. 62.)"

Since this regulation was in force when the provisions of Section 213 were enacted in 1924 and re-enacted in 1926, it has, in accordance with established principles of law, the same force as if embodied in the statute. (*Skinner* v. *Eaton*, 45 F. (2d) 568.) It follows that under Section 213 (b) as well as under Section 217 (a) (1), all of the authorities and other available tests of meaning can be harmonized only by a definition which includes all duties having their origin in contract, but excludes all which are not in that respect analogous to bonds and notes.

3. **The petitioner's construction is required for consistency.**

The petitioner's construction makes Section 217 (a) (1) consistent not only with Section 213 (b), but also with Section 236, as that section has been construed by the Courts. That section allows to all corporations, foreign and domestic, a "credit" of the amount of all interest on "obligations of the United States" in so far as such interest is required to be included in gross income under Section 233. It was therefore necessary in *American Viscose Corporation* v. *Commissioner* (*supra*), in order to reach the conclusion that the taxpayer, a domestic corporation, was taxable upon interest on a refund of Federal taxes, to find not only that the interest was not "exempt" under Section 213 (b), but also that it was not income against which the taxpayer was entitled to a "credit" under Section 236.

We shall argue under a later point that both of those propositions cannot be true. But reserving our argument on that point, it is clear that the decision of the Circuit Court of Appeals, in the *American Viscose Corporation* case (*supra*), holding the income taxable, necessarily involved a determination that "obligations" as used in Sec-

tion 236 is not used in the broad sense which includes statutory duties. If, the word as used in Section 236 is construed in the narrower sense, the logic of the decision as applied to the construction of Section 217 (a) (1), will require the conclusion that the interest in question is not within the taxable class; for it will lead to the demonstration that (1) the word "obligations" is used uniformly throughout the statute in its narrower sense, and (2) that that construction is adopted even where there is no context restricting the meaning.

(1) The only other uses of the word "obligations" in the income tax law are found in Sections 214, 216, 220, 221, 234, 245 and 257. It is unnecessary to review particularly all of these provisions; it will suffice to point out that they are all analogous to those contained in Sections 213 or 236 and obviously require the same construction. It will not easily be inferred that in Section 217 (a) (1) alone the word was used in a different sense.

(2) If in either section of the statute "obligations" should be given a broad meaning it is not in Section 217 but in Section 236, since in Section 236 there are no specific words to which the word "obligations" is to be assimilated, such as "bonds" and "notes" in Section 217 (a) (1).

It is submitted that the cumulative effect of the rule of strict construction, of the rule of *ejusdem generis,* and of the legislative definition of the word "obligations" as manifested by its accepted signification elsewhere in the same statute (assuming that *American Viscose Corporation* v. *Commissioner* (*supra*) and *United States Trust Co. of New York* v. *Anderson* (*supra*), were correctly de-

cided) will, unless overcome by evidences of a legislative intention to the contrary, require the acceptance of the petitioner's construction.

The reasons given by the Court below in support of its conclusion that Congress intended to tax foreign corporations on interest on tax refunds, are untenable.

1. The statement is reiterated in the opinion below that the income involved is in *fact* income derived from sources within the United States and that therefore it should be "treated as" such income under the provisions of Section 217 (a) (1); but this is a *non sequitur*. The evident purpose of the Revenue Acts of 1924 and 1926 was to substitute for the test of the *fact*—a test which in practice under the earlier Acts had proved "obscure and economically unsound" (see Finance Committee of Senate Report No. 275, 67th Congress, 1st Sess., p. 16)—an allocation based upon specific classifications. The very use of the expression that certain classes of interest were to be "treated as" derived from sources within the United States, and all other classes of interest to be "treated as" derived from sources without the United States, indicates that the specific provisions were to be absolutely controlling. For example, by the plain terms of Section 217 (a) (1), interest on deposits paid by American bankers to non-resident aliens not engaged in business and having no offices within the United States is to be "treated as" income derived from sources without the United States; yet in *fact* such interest is derived from sources within the United States in precisely the same sense as interest on a refund of Federal taxes. The words "income derived from sources within the United States" and "income derived from sources without the United States" are no more than a convenient

label or collective designation by which to avoid awkward repetition of the numerous specific classes of income which are to be taxed or not to be taxed. They throw no more light on the legislative intention than if the legislature had used in their place some such colorless expression as "income of the first class" and "income of the second class".

2. It is said in the opinion below that "no sufficient reason is advanced for exempting a foreign corporation when a domestic corporation is taxed" (R. 36). It is a complete answer to this that Congress has adopted wholly different tests for determining the taxability of income in the two cases. Residents and domestic corporations are taxed upon all gross income as defined in Section 213, subject to certain exemptions and credits. In the case of non-residents and foreign corporations, by the provisions of Sections 217 and 233, income taxes are imposed only upon specific and definite items or kinds of income as defined therein (subject to the same exemptions and credits allowed under Sections 213 and 236), and all classes of income other than those specifically included in Section 217 are excluded from the field of taxability. For example, interest on deposits paid by American bankers to foreign corporations not engaged in business and having no places of business in this country, is not taxed (Section 217 (a) (1) (A)), although our own citizens and domestic corporations are taxed with respect to such interest. Congress having unequivocally made the differentiation, the Courts are not concerned with the reasons for it. Such reasons, however, are in fact not difficult to suggest. Taxation of foreigners is largely a matter of reciprocity. In showing consideration for foreigners, Congress may wisely have had "remembrance of ourselves" in connection with foreign taxation

of our own citizens. As this Court said in *Barclay & Co.* v. *Edwards,* 267 U. S. 442, 451:

> "Considerations of policy toward foreign countries may very well justify an exemption of the foreign corporations from taxes that might legitimately be imposed on them, but which Congress does not think it wise to exact."

It may have been regarded as reasonable, moreover, to tax foreigners only on interest on capital which was here for the purposes of investment or commerce, and hence in competition with American capital and unreasonable to tax them on interest which is in essence part of compensation awarded them for wrongs which they have suffered at the hands of our government or citizens.

The discussion in the opinion below of the decisions in *United States Trust Co. of New York* v. *Anderson* (*supra*) and *American Viscose Corporation* v. *Commissioner* (*supra*) carries the Court's fallacious assimilation of foreign to domestic taxpayers to a conclusion which convincingly demonstrates the fallacy. Judge MANTON says (R. 35):

> "In *U. S. Trust Co.* v. *Anderson, supra,* we held that interest on condemnation awards was taxable as an obligation of a subdivision of a State. There is no substantial difference, in the viewpoint of taxation, between the obligation of a city to pay interest on an award and the obligation of the United States to pay interest on an overpayment of taxes, none of which were exempt later fom taxation. In *American Viscose Co.* v. *Comm'r, supra,* the tax was imposed upon a domestic corporation for interest on refunded taxes."

There is no sign of recognition in this of the fact that the taxpayers in the *United States Trust Co. of New York* case (*supra*) and the *American Viscose Corporation* case

(*supra*) were domestic taxpayers, unquestionably taxable upon the income involved unless it was interest on an "obligation" and hence exempted; whereas, in the instant case, the taxpayer is a foreign corporation, unquestionably *not* taxable upon the income involved, unless it was interest on an "obligation".

3. In support of its conclusion that the word "obligation" does not mean the same thing in Section 217 (a) (1) as it does in Section 213 (b), the opinion below refers to the "legislative history" of the two sections and finds that "it is a fair inference that Section 217 is the broader of the two" (R. 34). The opinion proceeds as follows, with respect to Section 217:

> "In its first form (as section 10 of the Revenue Act of 1916, 39 Stat. 765), it was apparently intended to extend the taxing power to situations not thought by the Attorney General (30 Ops. Attys. Gen. 435) to be included in the law as it then stood. Its present form, as indicated by the report of the Finance Committee of the Senate (Report No. 275, 67th Congress, 1st Sess., p. 16) is no retreat from that position, but rather a qualification and more explicit statement of that extension. We thus have revealed a purpose to enlarge the scope of the statute."

It will be clear, not only from the report of the Finance Committee of the Senate dealing with the 1921 Act referred to in the opinion below, but from a mere comparison of the 1921 Act (from which the 1926 Act derives) with the earlier Acts, that the revision embodied in the 1921 Act did not "reveal a purpose to enlarge the scope of the statute", but was intended to change the whole scheme and theory of taxation of foreigners in the interest of clearness and precision. From one sub-sec-

tion of eight lines contained in the 1918 Act, the provisions taxing such taxpayers, were changed to and succeeded by a section of the 1921 Act consisting of fifteen subdivisions and ninety-three lines. From a few general terms the provisions were changed to detailed and specific definitions. From the general rule that the sources of the income was the criterion for its taxability, the criterion became the precise definitions contained in the Act. And, most significant, from the general rule that all interest which could be reached by the United States was taxable, the 1921 Act provided that no interest was taxable, except such as came within the defined exceptions to the rule. We quote the report of the Finance Committee of the Senate on the subject:

> "Section 217 states explicit rules—applicable principally to non-resident aliens and foreign traders—for computing the net income derived from sources within the United States. The present law is both obscure and economically unsound, inasmuch as the Attorney General has held that where goods are manufactured or produced in the United States and sold abroad, no part of the profit is derived from a source within the United States. This section explicitly allocates certain important sources of income to the United States or to foreign countries, as the case may be, and with respect to the remaining income (particularly that derived partly from sources within and partly from sources without the United States) authorizes the Commissioner, with the approval of the Secretary, to determine the income derived from sources within the United States, either by rules of separate allocation or by processes or formulas of general apportionment."

In view of the foregoing, the Court below was clearly unwarranted in deciding the case, a foreign corporation

being the taxpayer, upon the theory that "It has long been Congress' desire to extend income taxes to all forms of taxable income." (Opinion below, R. 36.)

II.

The United States is not a "resident" of the United States, "corporate or otherwise", within the meaning of Section 217 of the Revenue Act of 1926.

It is well settled that in construing a tax statute

> " 'The legislature must be presumed to use words in their known and ordinary signification' * * * 'The popular or received import of words furnishes the general rule for the interpretation of public laws' * * * 'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.' This rule is applied to taxing acts. *DeGanay* v. *Lederer,* 250 U. S. 376, 381."
>
> *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 560.

Again,

> "The words of the statute are to be taken in the sense in which they will be understood by that public in which they are to take effect. Science and skill are not required in their interpretation * * *."
>
> *United States* v. *Isham,* 84 U. S. (17 Wall.) 496, 504.

> "Our duty is to read the statute according to the natural and obvious import of the language, without resorting to subtle and forced construction * * *."
>
> *U. S.* v. *Temple,* 105 U. S. 97, 99.

The authorities cited under our first point demonstrate that the rule of strict construction is applicable to the word "resident" as well as to the word "obligations". If a doubt exists, it must be resolved against the government and in favor of the taxpayer. We refer to our first point also for the proposition that there is nothing in the statute to indicate any general intention to tax foreign corporations except upon income clearly falling within the specifications of Section 217.

In *Helvering* v. *Stockholms Enskilda Bank*, 68 F. (2d) 407, and *State, A. R. Montgomery, Prosecutor* v. *Inhabitants of the City of Trenton*, 40 N. J. L. 89, the question whether the State is a "resident" has been decided favorably to petitioner's contention. The *Stockholms Enskilda Bank* case (*supra*) arises from the same state of facts as that presented in the case at bar and is now under review by this Court. In *State, A. R. Montgomery, Prosecutor* v. *Inhabitants of the City of Trenton* (*supra*), it was held by the Supreme Court of Judicature of the State of New Jersey that indebtedness to the State could not be deducted from the taxable value of property under a statute permitting the deduction of indebtedness to "residents". The Court said:

> "It is only by the greatest latitude of construction that we can say that the state resides within the state. The word 'residing' refers to individual abode, although it is sometimes used figuratively. It will not apply to the state in its representative and governmental relation to its citizens. The people, as individuals, reside in the state, but the political body called the state cannot be said, in the proper use of language, to reside anywhere."

The opinion below dismisses this authority with the following comment:

> "The *State* v. *City of Trenton, supra,* turned on the intent of the Legislature, declared by the court to be manifest, that the debtor should not be released from taxation unless the tax could be collected from the creditor." (See Opinion below, R. 35.)

But if the word "residents" included the State within its meaning without doubt or ambiguity, the Court could not have held that the State was not a "resident" by reasoning to the effect that the legislature intended something other than what it said. It follows that the case is at the least authority for the proposition that the word "resident" is a word of doubtful or ambiguous meaning. A fair doubt requires a decision in favor of the taxpayer.

Other authorities are persuasive, if of indirect bearing, upon the question of legislative intent. In determining the class of persons upon whom a tax is imposed, the Courts have uniformly held that the government which imposes the tax is not to be understood as included unless express words to that effect are used. In *Van Brocklin* v. *State of Tennessee,* 117 U. S. 151, 173 this Court said:

> "General tax acts of a State are never without the clearest words, held to include its own property * * *."

In *California Iron Yards Co.* v. *Commissioner,* 47 F. (2d) 514, 516, it was said:

> "It is a fundamental rule of construction that general language in a statute does not apply to the sovereign."

It is a fair presumption of fact that the draftsmen of the Federal income tax laws were familiar with the principles applied to the construction of tax laws generally. It would naturally occur to the mind of the expert draftsman that if the clearest words were necessary in order to identify the government for one purpose, identification for any

other purpose should not be left to vague implication. That this is a correct supposition with respect to the Revenue Act of 1926, is evidenced by the fact that the Act contains repeated references to the United States, the States and their subdivisions in direct and explicit language, and that no other instance has been cited in which such a reference is made by the use of other than direct and explicit language.

Not only is the United States identified by precise language wherever else in the statute it might possibly be meant, but a painstaking examination of the statute and the regulations has not disclosed any instance in which the word "resident", frequently used in both, has been used in a sense which might include a political body.

In these circumstances the language and reasoning of the Court in *Davis* v. *Pringle,* 268 U. S. 315, become pertinent. In that case the question was whether the Bankruptcy Act should be so construed as to give a general preference to debts due the United States under the expression "(5) debts owing to any *person* who by the laws of the States or the United States is entitled to priority". In holding that an examination of the Act as a whole made it clear that it was not intended to include the United States within the meaning of the word "person" in this provision, Mr. Justice Holmes said at page 318:

> "It is incredible that after the conspicuous mention of the United States in the first place at the beginning of the section and the grant of a limited priority, Congress should have intended to smuggle in a general preference by muffled words at the end. The States are mentioned in (5) before the United States showing that their laws were primarily in mind. The United States seems added to avoid some possibly overlooked case. The ordinary dignities of speech would have led to the mention of the United States

> at the beginning of the clause, if within its purview. Elsewhere in cases of possible doubt when the Act means the United States it says the United States."

Some of the reasoning of the Court below in support of its conclusion that the United States is to be regarded as a "resident" leads to manifest inconsistencies. It is said in the opinion below (R. 35):

> "The United States is a corporation. *Respublica* v. *Sweers*, 1 Dall. 41, 44, 1 L. Ed. 29; *United States* v. *Maurice*, 2 Brock. (U. S.) 96, 109 Fed. Cas. No. 15747 (per MARSHALL, *J.*). As such corporate entity, it must have a corporate residence; that residence must be within the United States".

But one cannot read the Revenue Act of 1926 without its becoming clear that wherever reference is made to corporations it is creatures of the State and not the State itself which are intended. The definition of corporations in Section 2 (2), which expressly includes "associations, joint stock companies, and insurance companies", implies that political entities are excluded. See also Section 214 (a) (10) where it is apparent that contributions to the United States are distinguished from contributions to "domestic corporations"; and Section 256 (2), which uses the language

> "* * * interest upon the bonds of foreign countries and interest upon the bonds of and dividends from foreign corporations".

The reference to foreign countries would have been wholly unnecessary if nations had been regarded as corporations.

We are not unmindful in this connection of the recent decision of this Court in *Ohio* v. *Helvering*, 292 U. S. 360. That case held that a state which exercised a monopoly

of the sale of liquor might be included within the meaning of the word "person" as used in the internal revenue laws imposing a tax on "persons" dealing in liquor, but it obviously does not go so far as to hold that the Federal government, the entity imposing the tax, would be held to be included within the taxable class under this language.

III.

If the word "obligations" as used in Section 217 is given the broad meaning which would make interest on tax refunds taxable, the same meaning must be given to the same word in Section 213 (b) (4) and the interest is expressly exempted from taxation.

It is said in the opinion below that "the meaning given to the word used in one connection is not necessarily the meaning to be attributed to it when employed in other connections" (R. 34), but in the case of a highly technical statute, the result of repeated revisions by experts, there is at least a strong presumption of uniformity of meaning of the same word throughout (*Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433, citing *Courtauld* v. *Legh*, L. R. 4 Exch. 126, 130). We refer to our argument under Point I (*supra*), pages 10-21, for the propositions that there is nothing in the context or the legislative history of the two provisions which justifies any differentiation of meaning; and that the same rule of construction is applicable to both provisions.

While it is of no practical consequence to the present taxpayer what meaning is given to the word "obligations" in these two provisions, provided only that the meaning is uniform, we deem it our duty to reiterate one

consideration which clearly tends toward a more liberal construction of the exemption provisions of Section 213 (b) (4) than was adopted in the *American Viscose Corporation* case (*supra*) and the *United States Trust Co. of New York* case (*supra*). The limitation of the exemption by these decisions to instruments such as bonds, is plainly inconsistent with Article 77, Regulation 62 of the Treasury Department (which has received the endorsement of Congress and has hence the same weight in determining the legislative intention as an express enactment), which regulation so construes Section 213 (b) (4) (C) as to make interest on deposits in postal savings banks exempt as "interest upon obligations of the United States".

IV.

It is the intention of the Revenue Act of 1926, unequivocally expressed in Sections 213 and 236, to exclude from the income of foreign corporations upon which the corporation income tax is imposed by Section 230 of the Act, all interest which may fall within any possible definition of "interest upon obligations of the United States". The history of the Federal income tax legislation from 1918 to 1926, shows clearly that such interest was never intended to be subjected to any taxation, except the war-profits and excess-profits tax which was enacted in 1918 and ceased to be effective after 1921, and to the tax imposed by Section 220.

Our argument on this point is based on the hypothesis that the word "obligations" and the word "residents" as used in Section 217 are to be given the meaning attributed

to them by the Court below and that the interest is not exempt under Section 213 (b) (4). It will be contended that even upon this hypothesis the conclusion that the income is not taxable is required by Section 236.

It is submitted that the following propositions are incontrovertible and self-evident from a reading of the statute:

1. Nothing can be included in "gross income" of a foreign corporation, except by virtue of the definitions contained in Section 217 and adopted by Section 233. These sections select out of "gross income", as defined generally in Section 213 (a), certain items as objects of taxation for foreign corporations and certain others for exclusion from taxation. With a single exception applying to mutual marine insurance companies, not pertinent to the present discussion, they *add* nothing to the definition of "gross income" contained in Section 213 (a).

2. By Section 213 (b), interest on certain, but not all "obligations of the United States" is exempted and hence excluded from "gross income" of any taxpayer, foreign or domestic. Our hypothesis is that this exemption does not include interest on tax refunds.

3. By the provisions of Section 236, all interest on "obligations of the United States", which is included in the "gross income" of any corporation, foreign or domestic, under Section 233, is the subject of a "credit". Section 236 provides clearly that the "credit" be determined and measured by the amount of the "inclusion". In the case of a domestic corporation, the amount of the "inclusion", and hence the amount of the "credit", is obviously the whole amount of interest on "obligations of the United States", which is not exempted under Section 213

(b) (4), since for domestic corporations the definition of "gross income" includes, without qualification or condition, all interest. In the case of foreign corporations, however, interest on "obligations of the United States" is included in "gross income" under Sections 233 and 217, and hence included in the "credit", only if it is "interest on bonds, notes or other interest-bearing obligations of residents"; since all other interest is expressly excluded from "gross income" of foreign corporations. If interest on a tax refund from the United States is interest on an "obligation" under this provision, it is *a fortiori* interest on an "obligation of the United States", *i. e.,* if it meets the test for inclusion in "gross income" under Sections 233 and 217, it meets the test for inclusion in the "credit" under Section 236. Any other conclusion necessitates the quite unreasonable assumption that despite the clear intention of Congress (1) to measure the credit for interest on "obligations of the United States" by the amount of inclusion of interest on such "obligations" under Sections 233 and 217, and (2) to make the test for inclusion under Sections 233 and 217, whether the interest is interest on an "obligation", it nevertheless used the word "obligations" in these two closely linked provisions with two different meanings.

4. The sole purpose of including any interest on "obligations of the United States" in "gross income" of corporations was to subject it to the war-profits and excess-profits tax which was not in effect after 1921, and to the 50% tax, which is in the nature of a penalty, imposed by Section 220.

It follows that *American Viscose Corporation* v. *Commissioner* (*supra*), as well as the decision of the Circuit Court of Appeals in the case at bar, are erroneous.

One naturally seeks an explanation of why two Circuit Courts of Appeals should have rejected a conclusion which seems to be so precisely demonstrable. The probable explanation is the difficulty of believing that Congress intended so apparently futile a proceeding as to add a given item to gross income and forthwith subtract the same item. That difficulty will disappear when the practical machinery for reporting income under the 1918 and 1921 Acts is recalled. The corporation income tax and the corporation war-profits and excess-profits tax were both determined on the basis of a single return. For the purpose of the war-profits and excess-profits tax, the item of taxable interest on "obligations of the United States" was necessarily to be reported. It was evidently considered convenient first to show on the report the aggregate income on the basis of which the war-profits and excess-profits tax was determined, and then to reduce that figure by a "credit" in the amount of the items which were subject to the war-profits and excess-profits tax, but not subject to the income tax. When the war-profits and excess-profits tax was repealed, the principal reason for this roundabout method of calculation was taken away; but there is not the slightest basis for reasoning that the repeal of the war-profits and excess-profits tax was intended to make classes of income subject to the corporation income tax which were not so subject to it before the repeal of the war-profits and excess-profits tax.

The discussion of the subject in the opinion below (R. 37) is in agreement with these contentions, except that the Court apparently regarded the following language in Section 236:

> "The amount received as interest upon obligations of the United States which is included in gross income under section 233 * * *."

as embracing only interest upon such government bonds issued after 1917 as are specifically excepted from the exemption granted by sub-section (b) (4) of Section 213, and not embracing interest on tax refunds from the United States, even though such refunds are included in gross income under Sections 233 and 217, by reason of being regarded as "obligations". The opinion says (R. 37):

> "So far as corporations are concerned, sections 213, 233, and 217 of the 1924 and 1926 acts * * * includes in 'gross income' interest upon certain of the bonds of the United States issued in the borrowing of money, and section 236 takes it out. Congress, we think, used the word 'obligations' in section 236 in reference to those obligations the interest upon which it specifically included in gross income."

The reference to Section 213 in this statement is confusing and unnecessary. By the terms of Section 236, the "credit" is measured by the inclusion of the interest under Section 233. In the case of foreign corporations, it is Section 233 (b) (as amplified by Section 217), and not Section 213, which determines whether or not such inclusion exists. Consequently the word "obligations" as used in Section 236 and applied to foreign corporations should logically be given the sense in which it is used in Section 217; the sense in which it may be used in Section 213 is irrelevant.

With respect to domestic corporations, the question is not precisely the same. The inclusion of interest on "obligations of the United States" in gross income of domestic corporations depends upon the definitions of Section 213 (a), which does not use the word "obligations", but includes all interest. It is to be noted that the Court below has made a somewhat inaccurate use of language in

its reference to "obligations the interest upon which it [*i. e.*, Congress] specifically included in gross income", under Section 213. Such interest on "obligations of the United States", as is included in gross income of domestic taxpayers is so included not by virtue of Section 213 (b), which specifically *exempts* certain "obligations", but by virtue of the affirmative provisions of Section 213 (a).

Conclusion.

For the foregoing reasons we respectfully submit that the judgment below should be reversed.

Respectfully submitted,

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Attorney for Petitioner.

John H. Jackson,
Haig H. Davidian,
Of Counsel.

CPY9785

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 977

BRITISH-AMERICAN TOBACCO COMPANY, LTD., petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The question raised in the present petition is the same as that involved in the Government's petition in *Helvering* v. *Stockholms Enskilda Bank,* No. 895, October Term, 1933. The decision below is in conflict with the decision of the Court of Appeals of the District of Columbia in the *Stockholms Enskilda Bank* case, 68 F. (2d) 407. Consequently, we do not oppose the granting of the writ of certiorari in this case, although we contend that the decision below is correct.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

APRIL 1934.

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U. S. GOVERNMENT PRINTING OFFICE: 1934

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 24

BRITISH-AMERICAN TOBACCO COMPANY, LTD., petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinions of the Board of Tax Appeals (R. 15–24) are reported in 27 B.T.A. 226. The opinion of the Circuit Court of Appeals (R. 32–38) is reported in 69 F. (2d) 528.

JURISDICTION

The judgment below was entered March 12, 1934 (R. 38). The petition for a writ of certiorari was filed April 23, 1934, and was granted May 7, 1934

(R. 39). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED AND STATUTES INVOLVED

The question presented and the statutes involved are the same as those in *Helvering* v. *Stockholms Enskilda Bank,* No. 10, October Term, 1934, except that in this case one payment of interest was made during 1925, pursuant to Section 1019 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 346, which section is substantially the same as Section 1116 (a) of the Revenue Act of 1926, involved in the *Stockholms Enskilda Bank* case.

STATEMENT

During the years 1925 and 1926 the petitioner, a foreign corporation with offices in New York City, received from the United States $132,407.17 and $1,394,357.64, respectively, as interest on overpayments of Federal income and excess-profits taxes. In its income-tax returns for those years the petitioner reported the money so received as nontaxable income. The Commissioner held that it was taxable and determined deficiencies accordingly (R. 11–12, 15). An appeal was taken to the Board of Tax Appeals (R. 3–5), where, pursuant to its previous decision in the *Stockholms Enskilda Bank* case, 25 B.T.A. 1328, the Board reversed the action of the Commissioner (R. 15–16). The Commissioner appealed to the Circuit Court of Appeals for the Sec-

ond Circuit (R. 25–28), where the action of the Commissioner was sustained and the decision of the Board of Tax Appeals reversed (R. 32–38).

ARGUMENT

The question presented in this case is the same as that covered in our brief in *Helvering* v. *Stockholms Enskilda Bank*, No. 10, October Term, 1934, and the argument presented there is incorporated here by reference.

Since the preparation of that brief the Government has, however, received the brief of the petitioner in the instant case, and it may be of assistance to discuss at some length the following contentions urged by the petitioner therein:

1. The petitioner contends that if the word "obligations", as used in Section 217(a)(1) of the Revenue Act of 1926, is so construed as to make the interest on the tax refunds taxable, the same meaning must be given the word in Section 213 (b)(4) and that the interest is in consequence expressly exempted from taxation by this latter section (Br. pp. 28–29).

Section 213(b)(4) provides:

> (b) The term "gross income" does not include the following items, which shall be exempt from taxation under this title:
>
> * * * * *
>
> (4) Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia;

> or (B) securities issued under the provisions of the Federal Farm Loan Act, or under the provisions of such Act as amended; or (C) the obligations of the United States or its possessions. Every person owning any of the obligations or securities enumerated in clause (A), (B), or (C) shall, in the return required by this title, submit a statement showing the number and amount of such obligations and securities owned by him and the income received therefrom, in such form and with such information as the Commissioner may require. In the case of obligations of the United States issued after September 1, 1917 (other than postal savings certificates of deposit), the interest shall be exempt only if and to the extent provided in the respective Acts authorizing the issue thereof as amended and supplemented, and shall be excluded from gross income only if and to the extent it is wholly exempt to the taxpayer from income taxes;
>
> * * * * *
>
> (U.S.C.App., Title 26, Sec. 954.)

As stated in the Government's brief in the *Stockholms Bank* case (p. 26), it was held by the Circuit Court of Appeals for the Third Circuit in the case of *American Viscose Corporation* v. *Commissioner,* 56 F. (2d) 1033, certiorari denied, 287 U.S. 615, and by the court below in the case of *United States Trust Co. of New York* v. *Anderson,* 65 F. (2d) 575, certiorari denied, 290 U.S. 683, that this section referred only to obligations incurred in the borrow-

ing of money, the purpose of the exemption being, as was said in the *American Viscose* case, "to aid in the flotation of government bonds and securities by making them tax free, and, therefore, more attractive to investors."

But the petitioner contends that the interpretation given the section in these decisions is too narrow, and it cites Article 77 of Treasury Regulations 62 in support of its conclusion that the section is broad enough to include the obligation of the United States to refund taxes illegally collected, although such obligation is obviously not incurred in connection with the borrowing of money. (Br. p. 29.) The petitioner says that this regulation constitutes, in effect, a controlling expression of the legislative will because this regulation, adopted in 1922, was in force when Section 213 was reenacted in 1924 and 1926 (Br. pp. 15–16). The regulation provides that—

> ART. 77. INTEREST UPON UNITED STATES OBLIGATIONS. * * * Interest credited to postal savings accounts upon moneys deposited in postal savings banks is exempt from income tax, * * * (Art. 77, Reg. 62).

We submit that the petitioner's contention is not sound for two reasons:

(a) It overlooks the fact that in the 1921 Act (Revenue Act of 1921, c. 136, 42 Stat. 227), enacted November 3, 1921, postal savings certificates of deposit were specifically characterized in Section 213(b)(4) as "obligations of the United States",

just as was done in the later Revenue Acts of 1924 and 1926. After providing that gross income should not include interest upon "(c) the obligations of the United States", the section states that "In the case of obligations of the United States issued after September 1, 1917 (*other than postal-savings certificates of deposit*), * * * the interest shall be exempt only if and to the extent provided in the respective Acts authorizing the issue thereof * * *." (Italics ours.) It is evident, therefore, that Article 77 of Treasury Regulations 62 is nothing more than a paraphrase of the statute which was in force when the regulation was adopted and was not intended to be an administrative interpretation of statutory provisions of indefinite or uncertain meaning.

(b) Moreover, it would seem to be too clear for argument that postal savings certificates of deposit are, like Government bonds and Government notes, obligations of the United States incurred in connection with the borrowing of money, and that, consequently, this section was not in any wise broadened by its reference to these certificates as obligations coming within the purview of the section.

2. Petitioner also contends that in any event the interest on the tax refunds is exempt under Section 236 (a), which provides that—

> For the purpose only of the tax imposed by section 230 there shall be allowed the following credits:

> (a) The amount received as interest upon obligations of the United States which is included in gross income under section 233; * * * (U.S.C. App., Title 26, Sec. 988.)

Section 233 provides that—

> (a) In the case of a corporation subject to the tax imposed by section 230 the term "gross income" means the gross income as defined in sections 213 and 217, except that mutual marine insurance companies shall include in gross income the gross premiums collected and received by them less amounts paid for reinsurance.
>
> (b) In the case of a foreign corporation, gross income means only gross income from sources within the United States, determined (except in the case of insurance companies subject to the tax imposed by sections 243 or 246) in the manner provided in section 217. (U.S.C.App., Title 26, Sec. 985.)

The position of the petitioner is that Section 236 (a) covers all obligations of the United States the interest on which is included in gross income, regardless of whether the interest is included in the gross income of a foreign corporation by reason of Section 217 (a) (1) or in the gross income of a domestic corporation by reason of the general definition of gross income included in Section 213 (a). And he argues that the decision in the *American*

Viscose case was wrongly decided in that it failed to give effect to the provisions of Section 236 (a).[1]

This contention is, we submit, refuted by the legislative history of Section 236(a). As was said by the court below, in reviewing the legislative history (R. 37–38):

> A review of the history of section 236 of the Revenue Act of 1926, c. 27 (44 Stat. 43 [26 U.S.C.A. § 988]), here considered, discloses that it was enacted and reenacted as a part of section 213 (26 U.S.C.A. § 954), and that at no time has it been considered or treated as part of section 217 (26 U.S.C.A. § 958). It had its origin in the Revenue Act of 1918, c. 18 (40 Stat. 1057). As to individuals, section 210 (page 1052) imposed a normal tax and section 211 imposed a surtax, while section 230 (page 1075) imposed a normal tax and section 301 (page 1088) imposed a war and excess-profits tax upon corporations. Section 213 (40 Stat. 1065) defined the gross income of individuals and section 233 (page 1077) made section 213 applicable to corporations. Subdivision b of section 213 (40 Stat. 1065), it will be observed, does not exclude from gross income interest upon all obligations of the United States incurred in the borrowing of moneys. Relating to the tax upon individuals, section

[1] In this case it was held, as has been stated, that the exemption provisions of Section 213 (b) (4), quoted above, (*supra*, pp. 3–4), related only to obligations of the United States incurred in the borrowing of money.

216 (page 1069) provided that for the purpose of normal tax only there should be allowed credits (b) "The amount received as interest upon obligations of the United States * * * which is included in gross income under section 213." Section 236 (page 1080) contained a similar provision with respect to normal tax upon corporations. Thus there was exempted by Congress, both as to individuals and corporations, from the normal tax, all interest received from obligations of the United States incurred in the borrowing of money, but it made a certain class thereof subject to surtax and war and profit taxes. War and profit taxes were carried forward in the Revenue Act of 1921, § 301, c. 136 (42 Stat. 272), for the year 1921 only, and sections 213, 216, and 236 (42 Stat. 237, 242, 257) were carried forward without substantial change. The war and excess-profits tax was in effect for the year 1921 and no longer. The provisions of sections 213, 216, and 236 were without limitation and were subsequently carried forward into the Revenue Act of 1924, c. 234 (43 Stat. 253), and 1926 (26 U.S.C.A. §§ 954, 958 and notes, 988). So far as corporations are concerned, sections 213, 233, and 217 of the 1924 and 1926 acts (26 U.S.C.A. §§ 954, and note 985, 958, 958 and note) includes in "gross income" interest upon certain of the bonds of the United States issued in the borrowing of money, and section 236 takes it out. Congress, we

> think, used the word "obligations" in section 236 in reference to those obligations the interest upon which it specifically included in gross income.

Whether Congress intentionally continued the provisions of Section 236 (a) beyond the expiration of the war and excess-profits tax provisions of the Revenue Acts of 1918 and 1921, or whether its continuance was an oversight, is not clear, but it is, we submit, manifest from the legislative history of the section that Congress intended by its provisions to exempt from taxation only the interest upon those obligations of the United States incurred in connection with the borrowing of money which it had specifically included in gross income under Section 213 (b) (4). Section 236 (a), as its history shows, has always been considered as a counterpart of Section 213 (b) (4) and as relating only to the particular type of obligations of the United States therein referred to. It has never been treated as having any relation to Section 217. We therefore submit that the petitioner's contention is without merit.

CONCLUSION

The decision below is correct and should be affirmed.

Respectfully submitted.

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OCTOBER 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

SUPREME COURT OF THE UNITED STATES.

No. 24.—October Term, 1934.

British-American Tobacco Company, Ltd., Petitioner, *vs.* Guy T. Helvering, Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 5, 1934.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is a companion case to No. 10, just decided. The facts, although differing in detail, are in substance the same. The same questions are involved. The court below reversed the Board of Tax Appeals for reasons substantially similar to those we have just expressed in No. 10. 69 F. (2d) 528. Upon the authority of No. 10 the judgment below is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.